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No. 83-140

IN THE

Supreme Court of the United States

October Term, 1983

THE PITTSBURG & MIDWAY COAL MINING CO.,
Appellant,

v.

REVENUE DIVISION, TAXATION AND
REVENUE DEPARTMENT OF THE
STATE OF NEW MEXICO,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

MOTION OF APPELLEE TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Is a state gross receipts tax validly applied to a wholly intrastate transaction?

2. Is a state gross receipts tax, levied upon the intrastate sale of coal to out-of-state purchasers, valid under the commerce clause because it satisfies the four part test of *Complete Auto Transit*?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The commerce clause of the United States Constitution, Article I, Section 8, Clause 3, provides:

> The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;

N.M. Stat. Ann. § 7-9-4 (1978) and its predecessor N.M. Stat. Ann. § 72-16A-4 (1953), which was identical in relevant part, provide:

> A. For the privilege of engaging in business, an excise tax equal to three and three-fourths percent of gross receipts is imposed on any person engaging in business in New Mexico.
>
> B. The tax imposed by this section shall be referred to as the "gross receipts tax."

N.M. Stat. Ann. § 7-9-3 (1978) and its predecessor N.M. Stat. Ann. § 72-16A-3 (1953), which was identical in relevant part, provide:

> As used in the Gross Receipts and Compensating Tax Act:
>
> . . .
>
> E. "engaging in business" means carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit;
>
> F. "gross receipts" means the total amount of money or the value of other consideration, received from selling property in New Mexico, from leasing property employed in New Mexico or from performing services in New Mexico . . . .

N.M. Stat. Ann. § 55-2-106(1) (1978) and its predecessor N.M. Stat. Ann. § 50A-2-106(1) (1953), which was identical in relevant part, provide:

> (1) In this article . . . [a] "sale" consists in the passing of title from the seller to the buyer for a price . . .

N.M. Stat. Ann. § 55-2-401 (1978) and its predecessor N.M. Stat. Ann. § 50A-2-401 (1953), which was identical in relevant part, provide:

> [T]he following shall apply:
>
> . . .
>
> (2) unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest . . .
>
> (a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; . . .

Ariz. Rev. Stat. Ann. § 42-1408 (1973) provides:

> There is levied and imposed an excise tax on the storage, use or consumption in this state of tangible personal property purchased from a retailer on or after July 1, 1956, at the rate of four per cent of the sales price thereof. Every person storing, using or otherwise consuming in this state tangible personal property purchased from a retailer is liable for the tax.

Ariz. Rev. Stat. Ann. § 42-1409 (1973) provides:

> A. The tax levied by this article does not apply to the storage, use or consumption in this state of the following described tangible personal property:
>
> . . .

2. Tangible personal property the sale or use of which has already been subjected to an excise tax equal to or in excess of that imposed by this article under the laws of some other state of the United States.

Ariz. Rev. Stat. Ann. § 42-1410 (1973) provides:

Any person who uses, stores or consumes any tangible personal property upon which a tax is imposed by this article and upon which the tax has not been collected by a registered retailer shall pay the tax as provided by this article, but every retailer maintaining a place of business in this state and making sales of tangible personal property for storage, use or other consumption in this state, unless exempt by the provisions of this article, shall at the time of making the sales collect the tax from the purchaser or user.

Ariz. Rev. Stat. Ann. § 42-1411 (1973) provides:

Every retailer shall collect from the purchaser the tax imposed by this article and give to such purchaser a receipt therefor in the manner and form prescribed by the department. The tax required to be collected shall be shown separately on the invoice or other proof of sale. The tax required to be collected shall constitute a debt owed by the retailer to this state.

No. 83-140

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THE PITTSBURG & MIDWAY COAL MINING CO.,
Appellant,

v.

REVENUE DIVISION, TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

MOTION OF APPELLEE TO DISMISS OR AFFIRM

Appellee Revenue Division, Taxation and Revenue Department of the State of New Mexico (hereinafter referred to as the state) hereby moves the Court to dismiss this appeal or in the alternative, to affirm the judgment of the New Mexico Court of Appeals on which certiorari was denied by the New Mexico Supreme Court, on the grounds that the questions presented by appellant are insubstantial because cases addressing similar issues have been decided previously and the law in this area is well established.

OPINIONS BELOW

The opinion of the New Mexico Court of Appeals is reported at 99 N.M. 545, 660 P.2d 1027 (Ct.App. 1983) and is reproduced as Appendix B hereto, at pages 21a to 46a. The decision and order of the hearing examiner of the Revenue Division of the New Mexico Taxation and Revenue Department, which was affirmed by the Court of Appeals, is reproduced as Appendix A, below, at pages 1a to 20a. The New Mexico Supreme Court initially granted certiorari to review the decision of the Court of Appeals, but subsequently quashed the writ as having been improvidently granted. ____N.M.____, 662 P.2d 645 (1983).

STATEMENT OF THE CASE

This appeal challenges a state's power to levy a gross receipts tax on the proceeds derived from the intrastate sale of coal on the basis that, although title to the coal passed to the purchaser within the state, ultimate delivery of the coal was to out-of-state purchasers. At issue is whether New Mexico's Gross Receipts and Compensating Tax Act, N.M. Stat. Ann. §§ 7-9-1 through 7-9-81 (1978),[1] as applied to appellant's business, violates the commerce clause of the United States Constitution.

Appellant in this case, the Pittsburg & Midway Coal Mining Co. (hereinafter referred to as appellant) is a Missouri corporation with its principal place of business in Denver, Colorado. Appellant mines and sells coal from properties located in McKinley County, New Mexico. App. at pp. 1a, 22a. In preparing

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[1] New Mexico's Gross Receipts and Compensating Tax Act, for portions of the time period in question in the assessment, was codified at N.M. Stat. Ann. §§ 72-16A-1 through 72-16A-34 (1971 Supp.). The relevant portions of the statute are set forth above. The current codification, also in effect during part of the assessment period, is found in N.M. Stat. Ann. §§ 7-9-1 through 7-9-81 (1978). The law was amended and recodified during the time periods included in the assessment at issue and citations throughout are to the recodified sections.

the coal for sale, appellant employs labor and machinery for the severance of the coal, crushes, screens, blends, stores, sells, and loads the coal. All of these activities are performed within New Mexico. App. at pp. 2a-3a, 23a.

The state audited appellant's business and assessed appellant for gross receipts tax on sales made by the appellant from its New Mexico mine to out-of-state customers. The sales in question were made pursuant to contracts with six different purchasers and provided that the sales were made f.o.b. McKinley Mine, McKinley County, New Mexico, with title and risk of loss passing to the out-of-state customer at the time the coal is loaded onto rail cars at the mine. App. at pp. 4a, 6a, 24a, 50a-52a, 56a.

The evidence presented below established that under three of the contracts the coal was loaded at the mine onto a unit train, while in the remaining contracts the coal was placed in hopper cars or trucks which were not necessarily part of such trains. App. at pp. 4a, 24a, 55a. The unit train, when used, stays as a whole, picking up coal at appellant's mine and delivering it out of state, primarily to Arizona purchasers. *Id.* The engines and cabooses of the unit trains hauling the coal are owned by the Atchison, Topeka & Santa Fe Railroad; the hopper cars are owned by the purchasers of the coal. *Id.* The unit train travels on the Atchison, Topeka & Santa Fe's rail line until it turns onto a spur to appellant's coal mine. The spur was built by the railroad specifically to transport coal from appellant's mine. App. at p. 55a. Appellant's individual customers negotiated the terms and conditions of transporting the coal in unit trains to obtain the lowest possible rates for shipping the coal. App. at pp. 52a, 57a. Appellant had no interest in the coal after it was loaded onto the unit train and was not involved in the transportion of the coal. App. at pp. 4a, 25a.

New Mexico's gross receipts tax is levied for the privilege of engaging in business within the state. N.M. Stat. Ann. § 7-9-4 (1978). Under the statute, engaging in business is defined as

"carrying on or causing to be carried on any activity with the purpose of direct or indirect benefit," N.M. Stat. Ann. § 7-9-3E (1978), and the tax is assessed on the "total amount of money . . . received from selling property in New Mexico, from leasing property employed in New Mexico or from performing services in New Mexico." N.M. Stat. Ann. § 7-9-3F (1978). Because appellant sells property in New Mexico and is engaged in business within the state, the statute mandates the imposition of the gross receipts tax and the assessment was issued on this basis.

The appellant protested the assessment on the basis that the tax, as applied to appellant's transactions, violated the commerce clause and a formal hearing before the state's hearing examiner was held. The hearing examiner sustained the assessment, reasoning that because title and risk of loss passed from appellant to its customers within the State of New Mexico and because all of the activities upon which the tax was imposed took place within the state, the transaction was intrastate and thus imposition of the tax was not restricted by the commerce clause. In addition, the hearing examiner held that, even if the transactions were interstate, imposition of the tax did not violate the four-part test enunciated by this Court in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977).

Upon appeal, the New Mexico Court of Appeals upheld the hearing examiner's decision and order and incorporated many of the examiner's factual determinations in its opinion. The court of appeals held:

> Considering all the factors of activities of [appellant], including the sale of the coal, the passage of the title, the matter of agency and other factors incidental to[appellant's] activities, . . . we hold that the imposition of the taxes did not impermissibly interfere with the Commerce Clause of the Federal Constitution.

App. at p. 44a; ____N.M.____, 660 P.2d 1027, 1040 (1983). The New Mexico Supreme Court initially granted the appellant's

petition for a writ of certiorari, but subsequently quashed the writ as having been improvidently granted. ___N.M.___, 662 P.2d 645 (1983).

SUMMARY OF ARGUMENT

The intrastate sale of coal constitutes engaging in business within the state and is thus subject to New Mexico's gross receipts tax. Appellant sells coal from its mine located in McKinley County, New Mexico, to out-of-state purchasers. The coal is mined, loaded, crushed, screened, blended, and stored in New Mexico. Title to and risk of loss of the coal pass to appellant's purchasers in New Mexico. App. at pp. 4a, 6a, 24a, 50a-52a, 56a. Thus, the transaction upon which New Mexico's gross receipts tax is levied, the sale, is an intrastate transaction and not subject to scrutiny under the commerce clause of the United States Constitution.

Even if this Court finds that the tax is imposed upon an interstate transaction, however, the tax is valid under the commerce clause because it satisfies the test enunciated in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). Although appellant argues that New Mexico's tax fails to meet the discrimination and multiple taxation elements of the four-part test, the tax is valid because it satisfies all of the requirements of that test. First, New Mexico has nexus with the taxed activity because the tax is imposed on a purely intrastate activity, the sale of the coal. Second, New Mexico's gross receipts tax does not discriminate against interstate commerce because it is applied uniformly to both inter and intrastate activities and does not result in a prohibited multiple tax burden on the sale; no other state may or does impose a similar tax on the activity. Third, the tax is fairly apportioned because it reaches only those activities occurring within the state, and fourth, New Mexico's tax is directly related to the benefits it provides to appellant. Thus the tax, when analyzed under the applicable commerce clause test set forth in *Complete Auto Transit* is valid.

Whether this matter is considered an appeal over which this Court has jurisdiction or a petition for writ of certiorari, this Court should decline to exercise its discretion to review the lower court opinion and grant this motion to dismiss or affirm because the question to be reviewed is not substantial: 1) It involves application of New Mexico's gross receipts tax to a wholly intrastate transaction and imposition of similar taxes has been upheld by this Court in *International Harvester Co. v. Department of Treasury*, 322 U.S. 340 (1944) and *State Tax Commission v. Pacific States Cast Iron Pipe Co.*, 372 U.S. 605 (1963) (*per curiam*); and 2)The question presented involves the interpretation of a particular statute with regard to one taxpayer in a specific circumstance and is thus not significant enough to merit a full hearing by this Court. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

ARGUMENT

POINT I

THE TRANSACTIONS AT ISSUE ARE INTRASTATE AND THUS SUBJECT TO NEW MEXICO TAXATION BECAUSE ALL ACTIVITIES UPON WHICH THE TAX IS LEVIED TAKE PLACE IN NEW MEXICO

The threshold question in analyzing the validity of New Mexico's tax as applied to appellant's sale of coal is to determine whether the tax is levied on an intra or interstate transaction. If the transaction is purely intrastate, there is no question but that the state in which the transaction took place may levy its taxes without having those taxes subject to commerce clause scrutiny. *Department of Treasury v. Wood Preserving Corp.*, 313 U.S. 62 (1941); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). Because the transaction taxed by New Mexico is intrastate in nature, the tax need not be analyzed under the commerce clause and is validly imposed on appellant's sale of coal.

New Mexico's gross receipts tax is imposed on the privilege of engaging in business in the state. N.M. Stat. Ann. § 7-9-4 (1978). Appellant operates a coal mine in New Mexico and mines, loads, hauls, crushes, stores, blends, and sells its coal within the State of New Mexico App. at pp. 2a-3a, 23a. New Mexico seeks to tax only that portion of appellant's business which takes place within the state. *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978). The gross receipts tax is levied upon business activities which took place wholly within New Mexico and is thus imposed on purely intrastate activities. The fact that the coal is ultimately disposed of out of state does not alter the intrastate nature of the activities being taxed, for, as this Court stated in *Western Live Stock*, an early case concerning New Mexico's gross receipts tax as applied to the sale of advertising both within and without the state:

> All the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere.

Id. at 260.

Here, as in *Western Live Stock*, the wholly intrastate nature of the transaction is demonstrated by the fact that the sale, which is the taxable event, took place wholly within New Mexico. Although appellant argues that the sale to its customers did not occur in New Mexico, this contention is not supported by the facts or the law and both the court of appeals and the hearing examiner found otherwise.[2] New Mexico's version of the Uniform Commercial Code provides that a sale takes place

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[2] The fact that provision is made in the contracts for post-delivery modification of the price of the coal according to BTU content is irrelevant in determining when the sales take place. The coal is weighed at appellant's mine and that weight is conclusive for determining the amount sold. App. at pp. 57a-59a. A later calculation based on the grade of the coal can not

(Cont. p. 8)

upon the passing of title. N.M.Stat. Ann. §§55-2-106(1) and 55-2-401(2)(b) (1978); *see also Bennett v. Western Surety Co.*, 95 N.M. 13, 618 P.2d 357 (1980). It is conceded that title to and risk of loss of the coal passed from appellant to its purchasers when appellant loaded the coal onto the railroad cars, because the contracts provided for delivery of the coal f.o.b. the railroad cars. App. at pp. 50a, 51a. It was also contractually established by the parties that the purchasers would become the owners of the coal upon delivery to the railroad so that the purchasers could execute more financially advantageous contracts for transportation directly with the railroad or other transporter. App. at pp. 52a, 57a. Thus the taxable event, the sale from appellant to its customers, took place wholly within New Mexico and New Mexico does not seek to tax anything but an intrastate transaction. *See International Harvester v. Department of Treasury*, 322 U.S. 340 (1944); *Western Live Stock*.

State gross receipts taxes levied in similar situations have been held valid by this Court on several previous occasions as having been imposed on purely intrastate transactions. In *International Harvester Co. v. Department of Treasury*, the Court determined that an Indiana gross receipts tax levied on sales by an Indiana seller to an out-of-state buyer was valid under the commerce clause because the taxable event, the sale, took place within the state. The Court stated:

> The consummation of the transaction was an event within the borders of Indiana which gave it authority to levy the tax on the gross receipts from the sales. And that

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2 (Cont. from p. 7)
alter when the sale took place. Those alterations in the price of the coal are contractually established for each specific grade of coal and BTU content. Further, the Uniform Commercial Code, N.M. Stat. Ann. § 55-2-401 (1978), provides that the sale occurs despite retention of a security interest in the goods by the seller. Certainly if retaining a security interest does not negate the sale neither does passing of title with provision for subsequent price modifications.

> event was distinct from the interstate movement of the goods. . .

322 U.S. at 348-49. This Court has thus definitively ruled that an in-state sale is an intrastate transaction subject to gross receipts taxation by the state in which the transaction occurred.

More recently, this Court decided *State Tax Commission v. Pacific States Cast Iron Pipe Co.*, 372 U.S. 605 (1963) (*per curiam*), which relied upon and reaffirmed *International Harvester*.[3] *Pacific States* held that "a state may levy and collect a sales tax, since passage of title and delivery to the purchaser took place within the state." 372 U.S. at 606. *Pacific States* is indistinguishable from appellant's case because delivery of the coal, as well as passage of title, took place in New Mexico. Appellant delivered the coal to the railroad and title immediately passed to the purchaser. The New Mexico Court of Appeals found that the railroad was acting as an agent of the purchaser[4] and delivery to the railroad constituted delivery directly to the purchaser. App. at pp. 38a-39a. Thus delivery of the coal took place within New Mexico. *Pacific States* is squarely on point and dispositive.

In addition, in other cases, the Court has found that similar local events are taxable as being wholly intrastate. *See, e.g., Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537 (1969) (photography is local event, and so taxable, although photographer is out-of-state corporation); *Alaska v. Arctic Maid*, 366 U.S. 199 (1961) (tax on freezer ships carrying fish is tax on local activity, even though fish are transported out of state

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[3] Appellant offers no valid reasons for distinguishing these cases from its own. Appellant argues that *Pacific States* is not dispositive because the purchaser took delivery of the goods directly from the taxpayer. This, however, is not a fact distinguishing *Pacific States* but is, rather, the exact situation presented here. Appellant makes no attempt whatsoever to explain or distinguish *International Harvester*. Jur.St. at p. 10.

[4] Appellant does not challenge this finding. Jur.St. at p. 13, fn. 6.

after freezing); *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951) (when sale can be attributed to local business activities, gross receipts of out-of-state company are taxable); *Western Live Stock v. Bureau of Revenue;* and *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923) (mining is a local activity, and so taxable despite the fact that ore will be shipped out of state).

Thus, the Court has previously ruled upon the precise issue presented by appellant and has found that states may validly impose their gross receipts or sales taxes upon in-state sales to out-of-state purchasers. The law on this point is clear. The state urges that this precedent be reaffirmed and the appellant's appeal dismissed or the New Mexico Court of Appeals decision affirmed.

POINT II

EVEN IF THE TAXED TRANSACTION IS IN INTERSTATE COMMERCE, NEW MEXICO'S TAX IS VALID UNDER THE COMMERCE CLAUSE BECAUSE IT MEETS THE TEST OF *COMPLETE AUTO TRANSIT*

Appellant offers two arguments why New Mexico's tax violates the commerce clause. First, appellant argues that the tax is imposed on an interstate transaction which is immune from state taxation. Second, and alternatively, appellant argues that if this Court rejects the argument that the transaction is immune from taxation, New Mexico's tax is invalid because it violates both the rule and the rationale of *Complete Auto Transit*. The state asserts that both arguments are without merit.

A. Interstate commerce is no longer immune from state taxation

Appellant argues that once the coal was placed upon the unit train in McKinley County, New Mexico, it entered the stream of

interstate commerce and is immune from the usual taxation power of the state of origin. Jur.St. at 7. This argument is based on the premise, now rejected by this Court in commerce clause analysis, that a state tax on any activity or transaction in interstate commerce is an invalid regulation of that interstate commerce. *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 610 (1951); *Freeman v. Hewitt*, 329 U.S. 249, 256 (1946). With this argument appellant urges a return to the "free trade" theory which this Court once applied to commerce clause cases. *McLeod v. J. E. Kilworth Co.*, 322 U.S. 327, 330-31 (1944). Clearly, appellant would benefit from application of this approach here for it would relieve appellant of the duty to pay the New Mexico tax and, if it were otherwise liable for the Arizona tax,[5] from that tax also. *See* discussion at Point II.C., below.

Appellants arguments on this issue, however, are futile. This Court overruled *Spector Motor, Complete Auto*, 430 U.S. at 289, and rejected the rule, found in *Freeman* and prior cases, that "a state tax on the 'privilege of doing business' is per se unconstitutional when it is applied to interstate commerce." *Id.* (quoting *Spector*, 340 U.S. at 609). This Court has stated clearly its decision that interstate commerce is not automatically immune from state taxation and must pay its way. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938).

In presenting the argument that the transaction taxed by New Mexico should be immune from taxation appellant ignores the uncontroverted mandate of this Court that state taxes will no longer be invalidated merely because interstate commerce is involved. *Complete Auto Transit*, 430 U.S. at 288. The state therefore argues that appellant's argument should not be considered.

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[5] The state does not concede this liability. *See* discussion at II.B.2., below.

B. New Mexico's tax is valid under *Complete Auto Transit*

In *Complete Auto Transit*, this Court announced its decision that the validity of a tax imposed on interstate commerce would henceforth be decided on the basis of the "practical effect" of the challenged tax on interstate commerce and the "economic realities" of the tax. 430 U.S. at 278-79.

In order to determine these practical effects, this Court developed a four-prong test which must be met in order for a state to tax a transaction in interstate commerce. The elements of this test are:

1. Does the activity taxed have a sufficient nexus with the taxing state?
2. Does the tax discriminate against interstate commerce?
3. Is the tax fairly apportioned?
4. Is the tax related to services provided by the taxing state?

430 U.S. at 279.

1. New Mexico has nexus with the taxed activity

The first requirement, that of nexus with the taxing state, is met if the property, transaction or person being taxed has some minimum connection with that state. *General Motors Corp. v. Washington*, 377 U.S. 436, 448 (1964). In assessing whether an unapportioned gross receipts tax could be applied by the State of Washington in that case this Court examined whether "the local activities of the [taxpayer] corporation formed 'some definite link' " with the state. *Id.* Pertinent to its finding that link, the Court cited the fact that General Motors "had district managers, service representatives and other employees who were residents of the state. . ." *Id.* at 447. The fact that General Motors had no home offices in Washington did not alter the Court's nexus finding. The Court found it sufficient that General Motors' contacts with Washington served to further its

sales operation within the state, and since the challenged tax was imposed upon sales "these local incidents were sufficient to form the basis for the levy of [the] tax." *Id.* at 447-48.[6]

Although *General Motors* was decided prior to *Complete Auto Transit* its teaching on the nexus requirement embodied in the four-part test is still applicable. *See Complete Auto Transit*, 439 U.S. at 279, fn. 8.

Appellant does not challenge New Mexico's nexus with the taxed activity. Jur.St. at 15.[7] The challenged New Mexico tax is imposed on appellant's gross receipts. The sale of coal taxed here contributed to appellant's New Mexico gross receipts. All of the incidents of that sale occur in New Mexico. *See Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 749 (1978). Appellant severs the coal and prepares it for sale in New Mexico. Preparation includes crushing, screening, blending, storing, and loading the coal. The purchasers' conveyances take on the coal in New Mexico. Appellant admits that at the time the coal is delivered to the conveyance, title to the coal and risk of its loss pass to the purchaser. Jur.St. at 11. After loading it on the purchaser's unit train appellant has no further connection with the coal. Appellant cannot show that another state has sale-related incidents. Contrary to appellant's assertion that the purchaser takes

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[6] *See also Standard Pressed Steel Co. v. Washington Department of Revenue*, 419 U.S. 560 (1975), in which the presence of a single employee in the state was sufficient to establish the required nexus, where the employee "made possible the realization and continuance of valuable contractual relations between appellant" and its buyer. *Id.* at 562.

[7] Appellant denominates its challenge to New Mexico's tax an attack based on apportionment grounds. This challenge is addressd at Point II. B.3. below. Appellant actually argues, however, that New Mexico should not be allowed to tax the transaction at all. Jur.St. at 17. In order to successfully make this argument appellant must show that New Mexico has no nexus with the taxed transaction. Yet appellant makes no attempt to disprove New Mexico's nexus with the sale.

dominion over the coal in Arizona, Jur.St. at 16, the purchaser takes dominion over the coal once it is loaded in New Mexico. Final determination of the amount shipped and the ultimate use of the coal, *id.*, are not incidents of that sale.

It must be concluded that New Mexico has a definite link with the appellant's sale of coal. The local incidents of that sale supply much more than the minimal connection required to establish nexus with New Mexico. The first part of the *Complete Auto Transit* test is met.

2. New Mexico's tax does not discriminate against interstate commerce

The second requirement of the *Complete Auto Transit* test is that the challenged tax must not discriminate against interstate commerce. A state imposes a tax which discriminates against interstate commerce if, by levying it, the state provides a direct commercial advantage to local business, *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959); *see Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), or subjects that interstate commerce to multiple burdens of taxation.[8] *Northwestern States*, 358 U.S. at 458. If the tax is imposed on intrastate and interstate commerce alike, *see McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45 (1940), and does not subject interstate commerce to a

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[8] The question of multiple tax burdens can logically arise under either the discrimination or apportionment portions of the *Complete Auto Transit* test. Appellant does not separate its arguments but makes a single argument that because the tax is unapportioned, it also discriminates against interstate commerce, in violation of *Complete Auto Transit*. Jur.St. at 16. The state will address the question of multiple burdens as they relate to the ban on discrimination against interstate commerce. A finding of a properly apportioned tax will preclude the existence of multiple tax burdens. *See Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. at 746-47.

multiple burden of taxation, *Northwestern States*, 358 U.S. at 458, it will satisfy this requirement.

New Mexico's gross receipts tax is applied uniformly to both intrastate and interstate activities. Appellant does not argue otherwise. It is only on the basis of alleged multiple burdens of taxation that appellant argues New Mexico's tax is discriminatory.

The burden of proving multiple taxation is on the taxpayer.[9] *General Motors v. Washington*, 377 U.S. at 449 (citing *Northwestern States*). Appellant cannot meet this burden with its vague argument that the Arizona use tax, imposed together with New Mexico's gross receipts tax, constitutes multiple taxation of its New Mexico sales. Jur.St. at 15-16. In fact, a multiple burden claim cannot be sustained in this case.

Arizona imposes an excise tax on the "storage, use or consumption in [Arizona] of tangible personal property purchased from a retailer . . ." Ariz. Rev. Stat. Ann. § 42-1408 (1973). The party liable for the tax is that "person storing, using or otherwise consuming in [Arizona] tangible personal property purchased from a retailer. . ." *Id.* The legal incidence of the Arizona tax is on the purchasers of appellant's coal. Appellant is not, under any possible reading of the pertinent statute, liable for the tax.[10]

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[9] Appellant cites *Evco v. Jones*, 409 U.S. 91 (1972), in support of its argument that a gross receipts tax is inherently suspect under the commerce clause. Jur.St. at 17. Yet this Court has clearly stated that multiple taxation must be proven. *General Motors*. Appellant's citation to *Evco* does not aid in this proof. The sales taxed in *Evco* took place outside the taxing state. Under current commerce clause analysis the validity of the *Evco* tax would turn on whether the taxing state had sufficient nexus with the sale to be taxed. The gross receipts tax imposed here is valid under this analysis.

[10] Ariz. Rev. Stat. Ann. §§ 42-1410 and 42-1411 require that the seller collect and remit the tax for the buyer. This provision does not alter the legal incidence of the tax. *See, e.g., Gurley v. Rhoden*, 421 U.S. 200 (1975); *U.S. v. California State Board of Equalization*, 650 F.2d 1127 (1982).

Appellant states that it is liable for the Arizona tax and that, while the tax could be "laid off" on its customer, Jur.St. at 16, it is in fact paying two taxes on the same transaction. This characterization is incorrect. In fact, the tax is imposed on the buyer, and although the responsibility of remitting the tax to Arizona may be "laid off" on the seller, this fact does not alter the buyer's liability for the tax. *United States v. California State Board of Equalization*, 650 F.2d 1127, 1130-31, *aff'd*, ____U.S.____, 102 S.Ct. 1744 (1982) (citing *United States v. Tax Commission*, 421 U.S. 599, 609 (1975)). Appellant's customer reimburses appellant for use taxes paid. App. at pp. 59a-61a. Additionally, under Ariz. Rev. Stat. Ann. § 42-1409.A.2, appellant's customers receive an exemption from use tax for the amount paid to New Mexico.[11] App. at p. 62a. Appellant infers that Arizona would tax appellant on the same sale upon which New Mexico levies its tax. Jur.St. at 14. Yet Arizona does not seek to tax either appellant or the sale of its coal. Appellant further argues that the "inadequacy of the New Mexico Court's treatment" of the tax is demonstrated by what is happening to it. Jur.St. at 15. Yet what is actually happening is that New Mexico seeks to tax appellant on its gross receipts, while Arizona seeks to tax appellant's customers for use of coal purchased from appellant,[12] and provides

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[11] This exemption provides an additional basis for rejecting appellant's multiple burdens argument, as is discussed below.

[12] Because it is not subject to both the Arizona and New Mexico taxes, appellant does not have standing to raise this issue. The question of standing is answered by determining "whether the litigant is entitled to have the Court decide the merits of the dispute or of the particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Because Article III restricts judicial power to cases and controversies, a litigant must allege that a challenged action caused him injury in fact. *E.G., Association of Data Processing Services Organizations v. Camp*, 397 U.S. 150 (1970). Appellant is not liable for multiple taxes. It thus does not have standing to raise the issue whether the imposition of those taxes violates the commerce clause.

a credit to that customer for the tax appellant paid New Mexico.[13]

It is clear that Arizona and New Mexico are imposing different taxes, on different activities, and on different taxpayers. There can be no serious argument that a multiple tax burden is being imposed on appellant here.

Although the fact that Arizona's use tax is imposed on a different taxpayer for a different privilege is enough to foreclose appellant's multiple taxation claim, there is an additional reason why appellant's claim is without merit.

Arizona provides the user of property purchased with an exemption from it use tax if a sales tax has been imposed on the sale of that property by another state. Ariz. Rev. Stat. Ann. § 42-1409.A.2. Although the exemption provision itself may be ambiguous, Jur.St. at 16, Arizona's application of that provision is not: an offset against use tax liability is given for taxes paid. App. at p. 62a. Thus, appellant's customer receives a credit for New Mexico taxes paid even though New Mexico's tax rate is one-quarter of one percent lower than Arizona's. Thus, the two taxes are never imposed together. Clearly appellant has not made a colorable claim that the New Mexico tax violates the second requirement of *Complete Auto Transit*.

3. New Mexico's tax is fairly apportioned

The third requirement imposed by the *Complete Auto Transit* test is that the challenged tax be fairly apportioned. A fairly apportioned tax reaches, and is meant to reach, only those

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[13] Arizona's credit for gross receipts tax paid follows the sales – compensating tax scheme employed by many states. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 65-66 (1963). The purpose of such a scheme is to make all tangible property used or consumed in a state subject to a uniform tax burden whether or not it was acquired within the state. *Id.*

activities that occur in the taxing state. *Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission*, 266 U.S. 271, 281 (1924) (citing *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 121 (1920)); *see also Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 96 (1948).[14]

Appellant argues that New Mexico's tax is not fairly apportioned. Jur.St. at 15.[15] This argument, however, confuses the apportionment and nexus requirements of the *Complete Auto Transit* test. Appellant does not argue that New Mexico should impose an apportioned tax on its sale of coal, it argues rather that only one state, Arizona[16] or New Mexico, should be allowed to tax the sale. Jur.St. at 17. It seeks to establish that some incidents of the sale took place in Arizona. Jur.St. at 16.

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[14] Appellant cites *Memphis Natural Gas Co.* in support of its argument that unapportioned gross receipts taxes impose multiple burdens on interstate commerce. Yet this case supports the validity of the challenged tax. Because Mississippi's tax was levied only on values within that state, 335 U.S. at 86, the Court found that it was properly apportioned.

[15] It also argues that by holding that because the sale and delivery of the coal took place in New Mexico, the New Mexico Court of Appeals allowed the nexus and relationship to services prongs to "swallow" the apportionment prong of the *Complete Auto Transit* test. Jur.St. at 15. However, the court of appeals recognized, by its finding, that where a tax is levied only on an activity occurring within the taxing state, it is properly apportioned. *Washington Stevedoring. See* discussion at II.B.3. below.

[16] Appellant urges the Court to establish a bright-line test for imposition of sales or use taxes: that the buyer's state may tax and the seller's may not. This test is not a proper one for the following reasons: 1) It will only yield results acceptable under *Complete Auto Transit* if the buyer's state has "substantial connections" with the taxed sale. *See* Lockhart, *A Revolution In State Taxation of Commerce*, 65 Minn. L. Rev. 1025, 1047-54 (1981). Thus, it will only be applicable when the nexus requirement of *Complete Auto Transit* is met. It is, therefore, an unnecessary test; 2) It ignores the "practical effects" inquiry this Court has mandated, because it substitutes an inflexible rule for the examination of economic realities required under the *Complete Auto Transit* test; and 3) It is inapplicable here because the sale took place in the seller's state.

It thus infers that Arizona would impose a tax on the sale of the coal. Jur.St. at 14. But Arizona does not seek to tax the sale of the coal. Rather it taxes the use of that coal after it is purchased. Ariz. Rev. Stat. Ann. § 42-1408 (1973).

As is shown in the discussion of the nexus requirement above, the sale upon which the challenged tax is imposed takes place in New Mexico.[17] When, as here, a tax is levied only on an activity occurring entirely within the taxing state "the tax is properly apportioned and multiple burdens logically cannot occur." *Washington Stevedoring*, 435 U.S. at 747; *see also Commonwealth Edison*, 453 U.S. 609, 618 (1981).

The Court in *Washington Stevedoring*, decided after *Complete Auto Transit*, distinguished those situations where activities lend themselves to multiple taxation, and thus must be apportioned, from those in which, because the taxed activity occurs only in the taxing state, a full tax on that activity could be found properly apportioned. 435 U.S. at 747, fn. 17.[18] The Court explained that, although the taxed activity may be a part of interstate commerce, if the activity is entirely local it may be taxed at full value by the state in which the activity takes place. *Id.; see also Department of Treasury v. Wood Preserving Corp.*, 313 U.S. 62, 67 (1941); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 58 (1940); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 257 (1938). And in *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307,

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[17] By its nature, a sale can take place in only one state. *See, e.g.*, N.M. Stat. Ann. §§ 55-2-106, 55-2-401 (1978); *see also Bennett v. Western Surety Co.*, 95 N.M. 13, 618 P.2d 357 (1980).

[18] *Cf. Central Greyhound Lines v. Mealey*, 334 U.S. 653, 670 (1948), Murphy, dissenting (The rule requiring apportionment of gross receipts taxes to the activities carried on within a state is one that is necessarily predicated upon the existence of some interstate activities which the commerce clause places beyond the taxing power of the state (citations omitted)).

313 (1938), this Court stated that "[s]o far as the sales price of the goods sold in interstate commerce includes compensation for a purely intrastate activity . . . it may be reached for local taxation . . . ."

Western Live Stock is particularly applicable here. In it this Court found that, although some of the subscribers to the magazine received the product in interstate commerce, the tax was validly imposed on "the carrying on of a local business," *id.* at 257, the measure of that tax being "the price at which the advertising was sold." *Id.* In this case the same situation exists. Although the sale of the coal can be characterized as a part of interstate commerce, New Mexico's tax is not levied on that commerce. It is only imposed on the sale of the coal, which takes place entirely within New Mexico. The state thus taxes only the activity which takes place within its borders.

As has been shown above, the sale of coal took place entirely within New Mexico. Thus, the tax is properly apportioned and meets the third requirement of *Complete Auto Transit.*

4. New Mexico's tax is fairly related to the services it provides

The fourth requirement of *Complete Auto Transit* is that the tax be fairly related to services provided by the taxing state. Appellant has not attempted to show that the challenged tax does not meet this requirement, and in fact it could not do so because the tax meets the requirement as a matter of law.[19]

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[19] This Court, in *Commonwealth Edison,* indicated that the applicable test is one of law not fact, 453 U.S. at 628, and does not require weighing the amount of tax against the services provided to the taxpayer relative to the taxed activity. The Court noted that "[a] tax is not an assessment of benefits. It is . . . a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society . . ." *Id.* (quoting *Carmichael v. Southern Coal and Coke Co.,* 301 U.S. 495, 521-22 (1937)).

The fourth prong of the *Complete Auto Transit* test is basically one of due process: "whether the state has given anything for which it can ask return." *Wisconsin v. J. C. Penney*, 311 U.S. 435, 444 (1940). Applying this test to Montana's severance tax on coal, this Court held:

> When a tax is assessed in proportion to a taxpayer's activities or presence in a state, the taxpayer is shouldering its fair share of supporting the state's provision of "police and fire protection, the benefit of a trained work force and 'the advantages of a civilized society.' "

Commonwealth Edison, 453 U.S. at 627 (quoting *Exxon Corp. v. Wisconsin Department of Revenue*, 447 U.S. at 228 (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979))).

New Mexico's tax is based on gross receipts earned within New Mexico. All of appellant's activities which contribute to the receipts taxed occur in New Mexico. The commodity sold is taken from the ground within New Mexico, the equipment used to mine it is in New Mexico. The appellant maintains operations in New Mexico to further its sales and employs citizens of New Mexico to perform the work necessary to these sales. Thus, the measure of New Mexico's tax is "reasonably related to the extent of its contact" with appellant, *Commonwealth Edison*, 453 U.S. at 626, and appellant "may properly be made to bear a 'just share of state tax burden.' " *Id.* (quoting *Western Live Stock*, 303 U.S. at 254).

In this case, New Mexico's tax is imposed in relation to its contact with appellant and is fairly related to the advantages it provides appellant in furthering its business. The tax thus meets the fourth and final requirement of *Complete Auto Transit* and is validly imposed.

C. The interstate commerce analysis employed by appellant is not a valid test because *Coe v. Errol* applies to import-export cases and supports the state's imposition of its tax

The transactions taxed by New Mexico are intrastate in nature and thus need not be subject to commerce clause scrutiny accorded interstate transactions. As demonstrated above, should the taxes nevertheless be scrutinized under the commerce clause, the applicable analysis is that set out in *Complete Auto Transit*. Under this analysis New Mexico's tax is valid. Appellant initially argues against application of the *Complete Auto Transit* test and advocates application of a test which is not appropriate in current commerce clause analysis and which would impermissibly give immunity from all taxation to appellant's transaction.

Coe v. Errol, 116 U.S. 517 (1886), upon which appellant bases its primary argument, upheld the imposition of a state tax on locally cut logs before they were transported out of state. *Coe* provided immunity from taxation to transactions which "are already in the course of commercial transportation, and are clearly under the protection of the constitution." *Id.* at 525. Under this analysis, once the goods entered the stream of foreign or interstate commerce, the states were absolutely prohibited from imposing any tax. *Id.*[20] *Coe* considered the question whether products of one state are taxable by that state if intended for export. The Court held that the state could not tax goods which have been deposited in the stream

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[20] The outcome of these cases was sometimes anomolous. For example, in *East Ohio Gas Co. v. Tax Commission*, 283 U.S. 465 (1931), the Court held that transmission of gas to Ohio municipalities under low pressure from out of state is local business and thus taxable, while in *State Tax Commission v. Interstate Natural Gas Co.*, 284 U.S. 41 (1931), it was determined that transmission of gas to distributors in state was part of interstate commerce and therefore not taxable.

of commerce, but was not prevented from taxing all activities until that point.

Although *Coe* was decided under the commerce clause, in recent decades the analysis it employed has been repeatedly cited only to support the invalidity of state taxation under the import-export clause of the United States Constitution.[21] For example, in *Kosydar v. National Cash Register*, 417 U.S. 62 (1974), the Court characterized the *Coe v. Errol* decision as concerning "exemption from taxation in the Import-Export clause. . . ." *Id.* at 67; *see also Empresa Siderurgica, S.A. v. County of Merced*, 337 U.S. 154 (1940); *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946). However, import-export clause analysis, based upon whether a transaction has entered the stream of commerce, is not applicable when a tax on interstate commerce is challenged under the commerce clause. *Complete Auto Transit; Kosydar; Richfield Oil Corp.* The test applicable in commerce clause analysis is that enunciated in *Complete Auto Transit* and discussed above, not the *Coe v. Errol* stream of commerce analysis.

All of the cases cited by appellant to support application of the stream of commerce analysis are cases in which the Court discussed challenges to a state tax under the import-export clause.[22] These cases will not support appellant's contention that New Mexico's tax is to be judged invalid under the

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[21] The import-export clause, Article I, Section 10, Clause 2, absolutely prohibits a state from imposing a tax on imports and exports, except to finance its inspection laws. *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 76 (1946). Appellant does not argue that its coal shipments are protected from state taxation by the import-export clause although much of appellant's argument is derived from import-export clause cases which are not relevant here.

[22] *See, e.g., Kosydar; Empresa Siderurgica; A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923); *Richfield Oil Corp.*

commerce clause because the coal had begun its interstate journey. If appellant prevails in its argument that this is a tax on interstate commerce whose validity should be judged under the stream of commerce analysis, then the sales in question will be subject to no tax in any state. Immunity from taxation is disfavored and the burden of establishing entitlement to the immunity is on the appellant. *General Motors Corp. v. Washington*, 377 U.S. 436 (1964). Immunity from taxation must be

> . . . accomplished with the qualification that the intention of the legislature to grant the immunity must be clear beyond a reasonable doubt. It cannot be inferred from uncertain phrases or ambiguous terms. The power of taxation is an attribute of sovereignty, and is essential to every independent government.

Hoge v. Railroad Co., 99 U.S. 348, 355 (1879). There is no authority in current law which would support appellant's total immunity from taxation since it is well established that "even interstate business must pay its way." *Western Live Stock v. Bureau of Revenue*, 303 U.S. at 254 (1938). Totally exempting appellant's privilege of engaging in business from New Mexico's or any other state's tax would ignore this unquestioned authority.

If *Coe* is applied, however, it supports New Mexico's position and is factually indistinguishable from the case presented. The holding for which appellant cites *Coe* is that "until actually launched on its way to another state, or committed to a common carrier . . . [the] destination [of the goods] is not fixed or certain," 116 U.S. at 528, and thus the goods or transaction are not in interstate commerce and may be taxed by the state.[23] *Coe* held that the event to be taxed, retaining

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[23] The negative implication of *Coe*'s holding is that, once the goods are consigned to a common carrier, they are in the stream of commerce and immune from state taxation. Appellant's assertion of tax immunity

(Cont. p. 25)

locally cut logs in a New Hampshire river before transporting the logs out of state, was an intrastate event and therefore subject to New Hampshire taxation. Appellant's delivery of the coal to its buyers in New Mexico is also a local event and thus subject to New Mexico taxation.

In *Coe*, there was no question of when the wood was sold; it was irrelevant because that was not the transaction being taxed. In appellant's case, the sale is the event which triggers imposition of New Mexico's gross receipts tax and it is clear from the evidence that this event occurred within the state. App. at pp. 4a, 6a, 24a. New Mexico's tax is equally valid as the tax upheld in *Coe v. Errol* and *Coe* factually supports the state's position because New Mexico is taxing the sale of the coal which took place in state and is not seeking to tax a transaction within the stream of interstate commerce. *See International Harvester Co. v. Department of Treasury*, 322 U.S. 340 (1944).

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23 (Cont. from p. 24)

as a result of delivery to a common carrier depends on the railroad being shown to be a common carrier, yet appellant has not established that the railroad was such a carrier in this instance. Appellant's only evidence was that, to the best of its knowledge, the Atchison, Topeka & Santa Fe was regulated by the Interstate Commerce Commission. Pursuant to 49 U.S.C. § 1(12), "coal cars supplied by shippers or receivers shall not be considered a part of such [common] carrier's fleet. . ." Because appellant's customers provided the hopper cars for the coal, App. at pp. 4a, 24a, the trains used here are not common carriers under the Interstate Commerce Commission Act. Nor are the unit trains common carriers under common law. A common carrier is one who serves the public as a whole and undertakes for hire to transport property of others. ***Washington v. Kuykendall***, 275 U.S. 207 (1927). Although the railroad is transporting property of others, it is not serving the public as a whole. This is evident from the facts that a unit train is utilized and the railroad spur is used only for transport of appellant's coal.

As demonstrated above, *Coe* should not be relied upon in resolving the question presented because it is legally inappropriate. The test, as set forth in *Complete Auto Transit*, is to be applied to determine the validity of New Mexico's tax under the commerce clause and that test demonstrates that New Mexico's tax passes commerce clause scrutiny.

CONCLUSION

In conclusion, the state respectfully requests that this Court dismiss this appeal, or in the alternative, affirm the judgment of the New Mexico Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Paula Forney-Thompson, attorney for appellee and a member of the bar of the Supreme Court, hereby certify that on the 30th day of September, 1983, I mailed three copies of the foregoing Motion of Appellee to Dismiss or Affirm, postage prepaid, to each of the following counsel: William H. Allen, Counsel of Record, Covington & Burling, 1201 Pennsylvania Avenue, NW, Post Office Box 7566, Washington, D.C. 20044 and J. Mitchell Reese and Donald E. Willson, 1720 South Bellaire Street, Denver, Colorado 80222.

PAULA FORNEY-THOMPSON

APPENDIX A

BEFORE THE DIRECTOR OF THE REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF *PITTSBURG AND MIDWAY COAL MINING COMPANY*, I.D. NO. 765016 TO ASSESSMENT NO. 151392, DOCKET NO. 80-02-05.

DECISION AND ORDER

I.

A.

This matter came on for a hearing before John E. Owens on May 4, 5, and 6, 1982, and continued pending the receipt of briefs. Pittsburgh [sic] and Midway Coal Mining Company (hereinafter referred to as "Taxpayer" or "Coal Company") was represented by John Pound, Esq. The Taxation and Revenue Department ("Department" or "Revenue Division") was represented by Edward F. Barnicle, Jr., Esq.

On the basis of all the evidence presented, it is decided and ordered that:

1. The Taxpayer is a Missouri business for-profit corporation which maintains its principal office at Denver, Colorado. The Coal Company, authorized to do business in the State of New Mexico, is engaged in the business of mining and selling coal from properties within the County of McKinley, State of New Mexico.

2. The Revenue Division conducted an audit of the Coal Company's operations and properties in McKinley County, New Mexico, and of some of the Company's books of account at Denver, Colorado, during the months of September through November, 1979.

3. During the course of the audit, the Coal Company furnished some of its business records to the auditors for examination. The auditors requested access to additional records of the Coal Company, some of which were furnished and others of which were withheld. Upon completion of the audit, the Revenue Division furnished a copy of the audit report to the Coal Company.

4. As a result of said audit, and some additional investigatory work, the Revenue Division issued Assessment No. 151392 dated December 31, 1979 (Department Exhibit A) for the period commencing on January 1, 1973 and extending to June 30, 1979 for New Mexico gross receipts tax in the amount of $4,922,834.72, for New Mexico compensating tax in the amount of $847,967.28, for penalty in the amount of $567,073.52, and for interest through November 25, 1979 in the amount of $517,260.22; totaling $6,755,135.74; all pursuant to Chapter 7, Articles 1 and 9 NMSA 1978.

5. Thereafter the Revenue Division issued abatements of $30,941.35 against the New Mexico gross receipts tax assessed, $4,530.03 against the New Mexico compensating tax assessed, $5,381.72 against the penalty assessed and $12,397.35 against the interest assessed.

6. The Coal Company paid the Revenue Division $14,364.07 on account of New Mexico compensating tax assessed, and $3,481.64 on account of interest assessed.

7. The remaining amounts of the assessment, unabated and unpaid, are $4,791,893.34 for New Mexico gross receipts tax, $829,073.18 for New Mexico compensating tax, $561,691.80 for penalty, and $501,381.23 for interest through November 25, 1979; totaling $6,684,039.58. All of the Coal Company's liability, if any, for the taxes, penalty, and interest included within Assessment No. 151392 was incurred as a result of the Coal Company's activities in employing labor and equipment for the severance and removal of coal and its crushing, screening,

blending, sale, and loading of said coal all within the County of McKinley, State of New Mexico.[1]

8. The Coal Company filed a timely protest to Assessment No. 151392.

B.

1. The Coal Company protested the assessment of New Mexico gross receipts tax upon the basis that it had been denied deductions for receipts from sales of coal which, it claims, were transactions in interstate commerce. The Taxpayer relies on §§ 72-16A-14.10 NMSA 1958 and 7-9-55 NMSA 1978 and Gross Receipts Tax Regulation 3(F):10.

2. The assessment of additional gross receipts taxes is predicted [sic] upon the inclusion in the gross receipts from sales made by the Taxpayer from its McKinley mine to out-of-state customers, primarily those located in the State of Arizona. Those sales were all made f.o.b McKinley Mine, McKinley County, New Mexico, with title passing to the out-of-state customer when the coal is loaded into conveyances at the mine.

3. In support of its position the Taxpayer introduced into evidence six "Coal Agreement Contracts"–with five Arizona customers–which contracts provided for the furnishing of a given supply of coal at a particular rate of delivery for an extended period of time. The most discussed contract, with supplements, was the one with Arizona Public Service Company ("APS") where APS contracted to acquire coal for its electric generation station at Cholla, Arizona. The contract was negotiated over a prolonged period of time. Negotiations were conducted in Phoenix, Kansas City, Chicago and other places. Testimony does not show where the contract was signed by the parties. Under that contract, there was a contractual guarantee to APS that the Taxpayer had sufficient coal

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[1]These figures are based on the Department's proposed finding [sic] of fact. The Taxpayer's figures are slightly different.

to meets [sic] the requirements of the purchaser and it provided that the Taxpayer would not in the future subsequently contract to sell coal to others that would reduce the amount of coal remaining for APS. To this end, the Taxpayer formally dedicated a geographic area portion of its McKinley coal mine to this particular customer. The contract provided that all coal delivered by the Taxpayer to APS shall be supplied from the Taxpayer's McKinley mine and title to all coal supplied shall pass to APS when coal is loaded in rail cars at the mine. The contract gave APS the right to change the point at which title to the coal passes and a supplement provided that APS shall have the right to divert coal to the Four Corners generating station in New Mexico. Apparently, APS never has diverted coal to the Four Corners Plant nor has it changed the place where title passes. APS also had the right, acting as agent for the Taxpayer, to sell coal to others.

4. Three of the coal agreement contracts with Arizona customers (including APA) [sic] provided for "unit train" transportation, apparently because of the volume of coal being transported. A unit train is a train which, as a whole, stays as a unit. The locomotives, hopper cars and caboose remain as a unit. The train as a unit comes to the coal mine where coal is loaded in the hopper cars, the train goes to its destination where the cars are unloaded and the train returns to the mine. At the mine, there is a spur or a loop track which enables the train to turn around. These customers negotiated with the Santa Fe Railroad the terms and conditions of transporting the coal in unit trains in order to achieve the lowest freight rate. In these cases, the railroad company owns the locomotives and cabooses used in the unit trains but, because of the economics involved, the customers apparently own the hopper cars in the unit trains. The customers pay the railroad for the transportation service.

5. At sometime, and it is not clear when, the Taxpayer constructed, or had constructed, facilities to sample, weigh,

and load coal into unit trains.[2] These facilities included a coal storage area located between the mine operation and the loading operation. The storage area could contain as much as one hundred thousand tons of coal. When the unit train arrives, the coal is drawn from the storage area mechanically and by gravity to a belt. The belt leads to a vertical loading device which is mounted above the track where the train comes in. The cars pass under the loader which loads the railroad car. As part of the delivery process, coal passes over certain scales of weighing mechanisms prior to being placed in the car.

6. Prior to the time the Taxpayer had facilities for loading unit trains, all deliveries of coal were made at the Taxpayer's original loading site. At that facility, coal was loaded into hopper cars and the loaded cars remained in the area until the Santa Fe railroad picked up the car or cars. If, after cars are loaded, a specific customer is unable to accept the loaded cars, the cars can be sent to a different customer. The evidence does not show how long the loaded cars remained in the area before the railroad moved out the car or cars. This original loading site apparently was used for all loading other than loading unit trains.

7. Three of the contracts introduced into evidence (which involved two Arizona purchasers) did not call for unit train loading and under these contracts the loading occurred at the original loading site. These contracts provided that title to coal passed from the seller to the buyer at the time the hopper cars were loaded. In at least one occasion, cars loaded for the Flintkote Co. were diverted from a Flintkote plant to an APS operation in Arizona.

8. In addition to sales made under the six contracts introduced in evidence, the Taxpayer made extensive sales to others some of whom were out of New Mexico and out of Arizona customers. In such cases, coal was loaded at the original loading

2 Testimony given indicates it was after 1975.

site into hopper cars or trucks. With one exception, title passed from seller to buyer when the car or truck was loaded. The evidence does not show the number of sales, or the applicable periods of time when sales occurred, in connection with these other sales.

9. At the hearing the Taxpayer gave estimates of sales of coal to its customers but the evidence does not show the amounts received from such sales or the applicable periods of time when sales of coal occurred in connection with unit trains.

10. (a) In summary, the Coal Company loaded all of the coal which it severed and sold from lands within McKinley County, New Mexico into conveyances at the site of the Coal Company's mining operations within McKinley County, New Mexico. The conveyances consisted of trucks and railroad cars. None of the conveyances were owned or controlled by the Coal Company, or by any person, firm or corporation having common ownership or a parent-subsidiary relationship with the Coal Company. Arrangements for the provision of the conveyances to receive the coal were made by the buyers of the coal. All of the charges for use of the conveyances and for the transportation of the coal away from the Coal Company's mining site were paid by the buyers of the coal.

(b) After the Coal Company loaded said coal sold into said conveyances, the conveyances were removed from the Coal Company's premises in McKinley County, New Mexico by others than the Coal Company, and were thereafter transported by others than the Coal Company to other places specified by the buyers of the coal, some within and some beyond the State of New Mexico. Some of the coal was transported to locations within the States of Missouri, Texas, Arizona and California, as well as to other locations within the State of New Mexico.

(c) The Coal Company sold all, or virtually all of its coal, upon written contracts and not oral contracts. Six such contracts were admitted into evidence. Each of the Coal Company's

contracts for the sale of coal which were admitted into evidence provided that the title to all coal sold will pass from the Coal Company to the buyer when the coal is loaded into railroad cars at the Coal Company's mining site in McKinley County, New Mexico; and testimony rendered by witnesses for the Coal Company established that the same provision with respect to the passage of title to coal sold prevailed in the other contracts referred to but not offered in evidence. The various contracts were negotiated and executed in various states, including New Mexico, and the billings for coal sold and the receipts of payments therefor were effected in the States of New Mexico and Colorado. After the coal sold was loaded into the conveyances, the risks of loss, damage and disappearance of the coal was solely borne by the buyers.

11. The Coal Company paid use taxes to the State of Arizona based upon the value of some of the coal sold at its mining site in McKinley County, New Mexico and thereafter transported into the State of Arizona. The Coal Company did not pay any transaction privilege (commonly known as sales) tax to the State of Arizona. The Coal Company did not pay any sales or use taxes to the States of Missouri, Texas, or California on account of coal sold at its mining site in McKinley County, New Mexico and thereafter transported by the buyers of the coal into those states. The Coal Company billed customers for, and has been reimbursed by the buyers of the coal for said use taxes paid to the State of Arizona.

12. The Coal Company has applied for a refund of the Arizona use taxes paid, and has requested the State of Arizona to withhold action upon that application pending the determination of the New Mexico protest proceeding.

C.

1. The Coal Company protested the assessment of New Mexico compensating tax upon the basis that it had been denied

deduction of the 50 percent of the value of its dragline equipment to which it claims to be entitled pursuant to §§ 72-16A-15 NMSA 1953 and 7-9-77 NMSA 1978 and Gross Receipts Tax Regulations 14.17:4 and 62:4.

2. The Coal Company does not contend that any of its dragline equipment upon the value of which New Mexico compensating tax was assessed in Assessment No. 151392 consisted of agricultural implements, farm tractors or aircraft; nor that any tangible personal property of the nature of a dragline was traded-in or the subject of a trade-in allowance at the time its dragline equipment was bought.

3. Each of the Coal Company's four units of dragline equipment is substantially identical to the others. An example is shown in Taxpayer's Exhibit 5. Each is a huge machine powered by outside sources–electricity. The electricity is furnished by trailing electric cables carrying 6900 volts connected to fixed sources of electric power. Each is equipped with a boom at least 320 feet long with cable hoists to operate a suspended 55 cubic yard bucket cabable [sic] of containing 260,000 pounds for digging and casting overburden. Each is about 30 stories high and weighs about 6,500,000 pounds. The machines were manufactured by the Bucyrus-Erie Corporation and shipped to the Coal Company's mining site in McKinley County, New Mexico in many pieces and parts. Each machine was assembled and erected out of the pieces and parts at the mining site, and none has ever left the mining site since it was originally assembled. Each dragline has tub-type turntable 58 feet in diameter and large "walking shoes" mounted as outriggers on the sides. Each shoe is about 62 feet long, 10 feet wide and 41 inches in depth. The operating cab, machinery house and boom, rotate on the tub by means of rollers and drive gears to permit the boom to be positioned over the overburden to be moved. The bucket is lowered to the overburden and pulled forward into the overburden by a drag hoist until the bucket is loaded. The maximum digging depth is 158 feet. The bucket is then hoisted,

the machine rotates to position the bucket over the spoil pile, and the bucket is tripped to dump the overburden clear of the area being stripped. The overburden can be moved up to 600 feet by rotating the machine 180 degrees between digging and dumping. The dragline is moved by lowering the walking shoes to the ground by means of an eccentric drive, then raising the machine (except the shoes); then the elevated machine is moved horizontally about six feet. After this move, the machine is set back down upon the ground, the shoes are elevated, moved and lowered again. This motion is repeated. The shoes do not move horizontally on the ground. The machine can be moved in only one direction: backward or the reverse of the direction in which the boom is extended. While the walking shoes are in use, the operator in the machine cannot see the area into which the machine is being moved. All vision of the area, and signals to the operator to proceed or to halt, must be given to the operator by another person who is located a distance of 25 or more feet from the machine, in the direction of movement. The area into which the machine is being moved must be leveled and cleared of obstructions in advance by another machine and another operator. While the machine is being moved, it transports nothing but its operator. The machines are not equipped with odometers, and the Coal Company has no records which reveal the linear distance which any of the machines have been moved. The machine operator cannot operate its boom and bucket to move overburden while the walking shoes are in use. The walking shoes cannot be used while the boom and bucket are in operation. The machine normally digs material at or below the level of the tub and can dump in piles 133 feet above the tub level. This permits removing the overburden from the coal seam in approximately 470 feet wide benches and casting the overburden to one side to allow access to the coal. The maximum rate of speed at which the machine can be moved is 12 feet per minute, or 1/8 of 1 mile per hour; it can also be moved at a lesser rate of speed.

4. The parties stipulated that former G.R. Regulations 14.17:4 and 62:4 were valid regulations of the Department and were in effect until their revocation on March 31, 1981.

5. Gross Receipts Tax Regulation 14.17:4 was renumbered as Gross Receipts Tax Regulation 62:4; their texts were identical. Each has been withdrawn, effective March 31, 1981 and were superseded by Gross Receipts Tax Regulation 62:11. G. R. Regulation 62:4 formerly provided:

> "The items of mining equipment listed below are "vehicles" as that term is used in this section and in Section 7-9-77. Therefore, the fifty percent (50%) deduction provisions of those sections apply to receipts derived from the sale of or the use of such machines. A trade-in deduction pursuant to Section 7-9-71, if applicable, must be taken before the deduction allowed by this section is computed.
>
> "The following machines are "vehicles" within the meaning of this section and Section 7-9-77:
>
> > "Shuttle cars are self-contained mobile mining machines mounted on rubber tire wheels, used to transport broken ore from the ore face in the mine to a loading point, where the ore is loaded into an underground train.
> >
> > "Undercutting machines are self-contained mobile mining machines mounted on rubber tire wheels. These machines are used to under cut or bottom cut the ore face prior to drilling.
> >
> > "Mining drills are self-contained mobile mining machines mounted on rubber tire wheels used to drill holes above the undercut prior to shooting.
> >
> > "Loading machines are self-contained mobile mining machines mounted on tractor treads and are similar to front end loaders. They are used to loan [sic] ore into shuttle cars.
> >
> > "Electric shovels are self-contained mobile mining machines mounted on tractor treads and are used in open pit mining operations to load ore and waste material into dump trucks.

"The following machines are *not* "vehicles" within the meaning of this section and Section 7-9-77:

"Diesel locomotives operated on rails used in underground mining operations.

"Cars used with diesel locomotives in underground mining operations."

II

A.

In *State Board of Equalization v. Blind Bull Coal Co.*, ____ Wyo. ____, 101 P.2d 70 at 72 (1940), the Wyoming Supreme Court gave examples of activities that precede interstate transportation and which were treated as *taxable* local events:

> "The generation of electricity though the generation and interstate transmission were practically instantaneous (*Utah Power & Light Co. v. Pfost*, 286 U.S. 165, 52 S.Ct. 548, 76 L.Ed. 1038); the production of natural gas that passed into interstate commerce by continuous movement from the wells (*Hope Natural Gas Co. v. Hall*, 274 U.S. 284, 47 S.Ct. 639, 71 L.Ed. 1049); the mining of ore that passed at once into the channels of interstate commerce to fill existing contracts with customers outside the state (*Oliver Iron Mining Co. v. Lord*, 262 U.S. 172, 43 S.Ct. 526, 67 L.Ed. 929); a sale of gasoline either for immediate use in interstate commerce (*Eastern Air Transport v. South Carolina Tax Comm.*, 285 U.S. 147, 52 S.Ct. 340, 76 L.Ed. 673), or for immediate transportation to another state (*Superior Oil Co. V. Mississippi*, 280 U.S. 390, 50 S.Ct. 169, 74 L.Ed. 504)."

In the instant case, the Coal Company performed all of its contractural [sic] obligations wholly within the State of New Mexico and all of its functions were performed prior to transportation began. Accordingly, the Taxpayer's gross receipts should be considered to be receipts from local–intrastate rather than interstate–transactions and thus taxable by New Mexico.

There is no question in this case about where title passed. In every instance, title passed to the buyer when coal was loaded,

in car or truck, in New Mexico. As to where delivery occurs, we are guided by *Standard Oil Co. of California v. Johnson*, 147 P.2d 577 (1944), where the court discussed the question of when delivery occurs. The Court stated, at 580:

> "Whether or not delivery to a carrier constitutes delivery to the buyer depends upon the intention of the parties as ascertained from the contract and the other circumstances of the case, and ordinarily, unless a contrary intent appears, where the seller contracts to deliver goods at a given destination and he delivers them to a carrier consigned to the buyer with freight charges paid by the seller (F.O.B. point of destination), the delivery to the carrier does not constitute delivery to the buyer and title does not pass until the goods have been delivered at there [sic] destination.* * * * The rule is based upon the theory that in such event the carrier is made the agent of the seller, not the buyer, in transporting the property."

Conversely, where, as here, the purchasers arrange for the mode of transportation, the transporter is the agent for the purchaser. And it is particularily [sic] true where, the purchasers arrange for unit train transportation and the hopper cars into which the coal is loaded, are owned by the purchasers.

Where a vendor sells property and passage of title and delivery occur in the vendor's state, that state can levy and collect a tax on that transaction. *State Tax Commission of Utah v. Pacific States Cast Iron [Pipe] Co.*, 372 U.S. 605, 83 S.Ct. 925 (1963). That case seems to be determinative in this case, where in every instance, title passed to the purchaser in New Mexico and the coal was delivered in New Mexico to the purchaser or the agent for the purchaser.

B.

The fact that this Taxpayer paid use taxes to the State of Arizona is significant but not for the reasons advanced by the Taxpayer. *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 97 S.Ct. 1386 (1977), made clear

that a use tax applies only when sales occur outside the taxing state. "By definition, a use tax is imposed only on sales made out of State." (Blackman [sic] J., concurring). In determining that its transactions with its Arizona customers were subject to the Arizona use tax, the Taxpayer recognized that the sales of the coal occurred in New Mexico. In "paying" the Arizona use tax, the Taxpayer was merely paying tax liabilities of its customers—the customers were liable for the use tax and the Taxpayer acted as agent in collecting and paying over the Arizona use tax. All use taxes "paid" by the Taxpayer were reimbursed by its customers.

In this case, the Taxpayer never paid any Arizona tax liability which it incurred. In New Mexico it never has paid any gross receipts taxes on its so-called interstate sales. If it incurs no tax liability in Arizona on these transactions it is difficult to see why the sales made in New Mexico are not subject to tax in New Mexico.

C.

The Taxpayer cites a number of cases, some of which involve an interpretation of the *export clause* of the United States Constitution. In *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 at 446, 99 S.Ct. 813 at 1820 [sic] (1979), the court rejected the argument that analysis of the commerce clause is identical, regardless of whether interstate or foreign commerce is involved. There the court held that a somewhat different, more extensive constitutional inquiry is required when the issue involves foreign commerce.

The Taxpayer relies on *Evco v. Jones*, 459 U.S. 91, 93 S.Ct. 349 (1972). But the *Evco* case involved a situation where the sale of property occurred out-of-state. That case is distinguishable from the present case where the sale of property took place in New Mexico. The Taxpayer also cites *Albuquerque Moving & Storage Co. v. Commissioner of Revenue*, 82 N.M. 45 (1970), which was concerned with when interstate commerce ends. In

the instant case, we are concerned with sales which occur prior to the time interstate commerce begins.

D.

Assuming that the Taxpayer's sales are not intrastate transactions but rather are interstate sales, taxpayer's basic theory "reflects an underlying philosophy that interstate commerce should enjoy a sort of 'free trade' immunity from state taxation" which theory was rejected in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076 (1977). That opinion reaffirmed the principle that interstate commerce should be made to pay its way.

The most recent Supreme Court decision on interstate commerce is *Commonwealth Edison Co., et al v. State of Montana*, ____ U.S. ____, 101 S.Ct. 2946 (1981). There, Montana imposed a severance tax on coal mined in that state. The coal was sold to out-of-state utilities. The Court said:

> "The Court has, however, long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity. *See Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 350 97 S.Ct. 2434, 2445, 53 L.Ed.2d 383 (1977); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141-142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970); *Nippert v. City of Richmond*, 327 U.S. 416, 423-424, 66 S.Ct. 586, 589-90, 90 L.Ed. 760 (1946). Correspondingly, the Court has rejected the notion that state taxes levied on interstate commerce are *per se* invalid. *See, e.g., Washington Revenue Dept. v. Associatiosn of Wash. Stevedoring Cos.*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 1978; *Complete Auto Transit, Inc. v. Brady, supra.* In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax." *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443, 100 S.Ct. 1223,

1234, 63 L.Ed.2d 510 (1980). *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 276-281, 98 S.Ct. 2340, 2346-48, 57 L.Ed.2d 197 (1978); *Washington Revenue Dept. v. Association of Wash. Stevedoring Cos., supra*, 435 U.S., at 743-751, 98 S.Ct., at 1395-99; *Complete Auto Transit, Inc. v. Brady, supra*, 430 U.S., at 277-279, 97 S.Ct. at 1078-79. We conclude that the same 'practical' analysis should apply in reviewing Commerce Clause challenges to state severance taxes.

"In the first place, there is not [sic] real distinction—in terms of economic effects—between severance taxes and other types of state taxes that have been subjected to Commerce Clause scrutiny. *See, e.g., Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583 (1954); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 67 S.Ct. 815, 91 L.Ed. 993 (1947); *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68 (1937), both overruled in *Washington Revenue Dept. v. Association of Wash. Stevedoring Cos., supra*. State taxes levied on a 'local' activity preceding entry of the goods into interstate commerce may substantially affect interstate commerce, and this effect is the proper focus of Commerce Clause inquiry. *See Mobil Oil Corp. v. Commissioner of Taxes, supra*, 445 U.S., at 443, 100 S.Ct. at 1234. Second, this Court has acknowledged that 'a State has a significant interest in exacting from interstate commerce its fair share of the cost of state government," *Washington Revenue Dept. v. Association of Wash. Stevedoring Cos., supra*, 435 U.S. at 748, 98 S.Ct. at 1398. As the Court has stated, '[e]ven interstate business must pay its way.' *Western Live Stock Bureau v. Bureau of Revenue*, [sic] 303 U.S. 250, 254, 58 S.Ct. 546, 548, 82 L.Ed. 823 (1938), quoting *Postal Telegraph-Cable Co. v. Richmond*, 249 U.S. 252, 259, 39 S.Ct. 265, 266, 63 L.Ed. 590 (1919). Consequently, the *Heisler* Court's concern that a loss of state taxing authority would be an inevitable result of subjecting taxes on 'local' activities to Commerce Clause scrutiny is no longer tenable.

"We therefore hold that a state severance tax is not immunized from Commerce Clause scrutiny by a claim that

> the tax is imposed on goods prior to their entry into the stream of interstate commerce. Any contrary statements in *Heisler* and its progeny are disapproved. We agree with appellants that the Montana tax must be evaluated under *Complete Auto Transit's* four-part test. Under that test, a state tax does not offend the Commerce Clause if it 'is applied to an actiity [sic] with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State.' 430 U.S., at 279. 97 S.Ct., at 1079."

In applying the four-part test announced in *Complete Auto Transit* to this case, it seems clear that the instant Taxpayer meets the first test. The Taxpayer engaged in the strip mining of coal located in New Mexico; it crushes, screens, blends, and loads coal at its New Mexico mine which New Mexico coal is sold to various customers. This activity in New Mexico clearly establishes the nexus test.

It is also clear that the New Mexico gross receipts tax does not discriminate against interstate commerce. There is only a single tax applied to all who are engaged in business in the state. The tax "is not discriminatory, [because it] places no greater burden upon interstate commerce than the state places upon competing intrastate commerce of like character." (Justice Rutledge concurring in *Memphis Natural Gas Co. v. Stone*, 325 U.S. 80, 68 S.Ct. 1475 (1948)). The sales occur in New Mexico. No one contends that the sales of coal (as opposed to the use of coal) were subject to tax in Arizona. Therefore, it seems clear that the third test is met.

The fourth test is whether the tax is fairly related to services provided by the state. Insofar as the record shows during the audit period, all of the transactions in question involved coal mined, processed, and loaded all within New Mexico. None of these activities were performed by the taxpayer outside of

New Mexico.[3] The innumerable services provided by the State of New Mexico to the Taxpayer's coal mine, properties and employees meet the fourth test of *Complete Auto Transit.*[4]

The remaining question is whether the New Mexico gross receipts tax is "fairly apportioned." The evidence shows that–aside from the negotiating [of] sales contracts which may have occurred outside of New Mexico–all of the Taxpayer's activities were performed in New Mexico. The mining, the on-site transportation by truck and conveyor belts, the crushing, screening and indeed the sale of the coal itself all occurred in New Mexico. The customers acquired title to the coal in New Mexico. As in the *Montana* [sic] case, no other state could impose a gross receipts tax on this taxpayer. Under such circumstances it would seem that the tax is fairly apportioned. *Department of Treasury v. Wood Preserving Corporation,* 313 U.S. 62, 61 S.Ct. 885 (1941); *Standard Pressed Steel Co. v. Washington,* 419 U.S. 560, 95 S.Ct. 706 (1975). It is held that the Taxpayer's receipts from sales of coal are not exempt or deductible.

III.

The Department contends the Taxpayer "did not prove the amounts of gross receipts which it received from persons to whom it sold coal and which persons it believes to have removed that coal from the State of New Mexico after buying it." The Taxpayer says "the record is confused concerning the exact amounts of [the assessment] which remains in controversy and a final accounting by the parties is required."

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3 Although the Taxpayer opened an office in Arizona in 1975, there is no evidence as to what that office did or how long it existed.

4 "When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of 'police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.' " *Commonwealth Edison v. Montana,* 101 S.Ct. at 2959.

The Taxpayer furnished the Department's auditor with production records for the audit period of 1976, 1977, 1978, and the first six months of 1979. The taxpayer permitted the auditor to look at four contracts. The Taxpayer did not furnish the auditor with records prior to 1976. At the formal hearing, [sic] the Taxpayer put in evidence six contracts including the four furnished to the auditor. Production records were not placed in evidence. Although information showing sales of coal and the name of the buyers, transaction by transaction, was available to the Taxpayer, such information was not produced at the formal hearing. At the hearing the taxpayer recognized that the record made at the hearing did not give that information. The Taxpayer was given an opportunity to do so, but the Taxpayer decided not to present any additional information.

The Taxpayer failed to establish how much of its gross receipts are exempt, or deductible, from gross receipts. Under the circumstances, it is concluded that the Taxpayer has failed to establish clearly its rights to the claimed deductions or exemptions. *Reed v. Jones*, 81 N.M. 481 (1970).

IV.

The evidence given at the hearing upon the coal Company's protest with respect to the draglines was clear and uncontroverted. The Coal Company's draglines conform in every material quality and aspect to the draglines described in *Kaiser Steel Corp. v. Revenue Division*, 96 N.M. 117, at pp. 120 and 121, 628 P.2d 687 (Ct.App. 1981), *cert. denied* 96 N.M. 116, except that they are greater in every particular—weight, length, height, capacity—than those described in the Court's opinion. The Court's majority opinion in the *Kaiser Steel* case considered every argument which can be based upon the authorities cited in the Coal Company's protest and found that the value of dragline mining equipment of this character and magnitude is not subject to deduction for compensating tax purposes. For example, the Court held:

"From all the foregoing, we find it impossible to conclude that the continuous miner and dragline are 'vehicles' under the Motor Vehicle Code. Accord Gibbons & Reed Company v. Bureau of Revenue, 80 N.M. 462, 457 P.2d 710 (1969).

"Because the machine must, in the first instance, be a 'vehicle' in order to qualify under either exception, see Gibbons & Reed Company v. Bureau of Revenue, supra, and, as shown above, neither the dragline nor continuous miner can be so classified, under § 66-1-4(B)(71), neither are 'vehicles not required to be registered' within the meaning of § 7-9-77. Further, as to the requirements of § 66-3-1(B), a finding that a machine 'moves' or is 'mobile' does not in itself support a conclusion that the machine can be 'driven or moved upon a highway' for any purpose. In fact, the evidence here is to the contrary. Neither the dragline or continuous miner are 'vehicles' exempt from registration under the Motor Vehicle Code.

"A similar case was presented in Gibbons & Reed Company v. Bureau of Revenue, 80 N.M. 462, 457 P.2d 710 (1969), which held that a piece of mining equipment called a 'mole' was not 'special mobile equipment' because it did not come within the general descriptive terms of the section. [§ 64-1-12, N.M.S.A. 1953 Comp., now §66-1-4(B)(60), N.M.S.A.]. The 'mole' which weigned [sic] approximately one hundred tons, was used to move employees and supplies in and out of a tunnel and to remove excavated material from the tunnel.

On the authority of the Court of Appeals' [sic] decision in the *Kaiser Steel* case, the Coal Company's claim for a deduction from the value of its dragline property is denied.

V.

The Taxpayer (or its parent) has a tax department which employs attorneys and accountants. The Taxpayer filed tax reports based on advice from in-house tax advisors. Under the circumstances, unpaid penalties reflected in Assessment No. 151392 are to be abated.

VI.

The Taxpayer's protest to the unpaid tax and interest reflected in Assessment No. 151392 is denied. As stated in V above, unpaid penalties are to be abated.

DONE this 27th day of July, 1982, in Santa Fe, New Mexico.

A. B. SNEAD, Director
Revenue Division
Taxation and Revenue Department

/s/By: John E. Owens
JOHN E. OWENS
Hearing Examiner

* * *

CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the foregoing Decision and Order to be mailed to John Pound, Esq., Post Office Box 2307, Santa Fe, New Mexico 87501, and to Donald E. Willson, Esq., The Gulf Companies, 1720 S. Bellaire Street, Denver, Colorado 80222, on this the 27th day of July, 1982.

/s/ John E. Owens
JOHN E. OWENS

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

PITTSBURGH [sic] & MIDWAY
COAL MINING COMPANY,
Petitioner-Appellant,
v.
REVENUE DIVISION, TAXATION
AND REVENUE DEPARTMENT
of The State of New Mexico.
Defendant-Appellee.

No. 5910

OPINION

LOPEZ, Judge

Pittsburgh [sic] and Midway Coal Mining Company (Taxpayer) appeals a decision and order of the Revenue Division of the Taxation and Revenue Department of the State of New Mexico (Department) imposing tax assessments of approximately $6,684,039.58, which includes gross receipt taxes, compensating taxes, penalty and interest. We affirm.

This appeal presents three issues for our determination: 1. The jurisdiction of this court to hear the appeal; 2. The legality of the imposition of the gross receipt taxes and the deductions claimed by Taxpayer; 3. Legality of the compensating tax and the deductions claimed by Taxpayer.

FACTS

In December 1979 the Department assessed Taxpayer for gross receipt and compensating taxes, interest and penalty.

The Department asserted that Taxpayer owed gross receipt taxes on proceeds from the sales of coal to out-of-state buyers during the audit period January 1, 1973 through June 30, 1979. The Department contended that Taxpayer owed compensating taxes for the operation of four draglines at its McKinley County mine during the same periods. Taxpayer protested both assessments and requested a formal hearing. An evidentiary hearing was held at the Department's office in May 1982. The Department entered its decision and order in which it found against Taxpayer on all issues except the penalty.

We shall set forth herein all the pertinent findings of the Department:

A.

1. The Taxpayer is a Missouri business for-profit corporation which maintains its principal office at Denver, Colorado. The Coal Company, authorized to do business in the State of New Mexico, is engaged in the business of mining and selling coal from properties within the County of McKinley, State of New Mexico.

2. The Revenue Division conducted an audit of the Coal Company's operations and properties in McKinley County, New Mexico, and of some of the Company's books of account at Denver, Colorado, during the months of September through November, 1979.

3. During the course of the audit, the Coal Company furnished some of its business records to the auditors for examination. The auditors requested access to additional records of the Coal Company, some of which were furnished and others of which were withheld. Upon completion of the audit, the Revenue Division furnished a copy of the audit report to the Coal Company.

4. As a result of said audit, and some additional investigatory work, the Revenue Division issued Assessment No. 151392 dated December 31, 1979 (Department Exhibit A) for the period commencing on January 1, 1973 and extending to June 30, 1979 for New Mexico gross

receipts tax in the amount of $4,922,834.72, for New Mexico compensating tax in the amount of $847,967.28, for penalty in the amount of $567,073.52, and for interest through November 25, 1979 in the amount of $517,260.22; totaling $6,755,135.74; all pursuant to Chapter 7, Articles 1 and 9 NMSA 1978.

5. Thereafter the Revenue Division issued abatements of $30,941.35 against the New Mexico gross receipts tax assessed, $4,530.03 against the New Mexico compensating tax assessed, $5,381.72 against the penalty assessed and $12,397.35 against the interest assessed.

6. The Coal Company paid the Revenue Division $14,364.07 on account of New Mexico compensating tax assessed, and $3,481.64 on account of interest assessed.

7. The remaining amounts of the assessment, unabated and unpaid, are $4,791,893.34 for New Mexico gross receipts tax, $829,073.18 for New Mexico compensating tax, $561,691.80 for penalty, and $501,381.23 for interest through November 25, 1979; totaling $6,684,039.58. All of the Coal Company's liability, if any, for the taxes, penalty, and interest included within Assessment No. 151392 was incurred as a result of the Coal Company's activities in employing labor and equipment for the severance and removal of coal and its crushing, screening, blending, sale, and loading of said coal all within the County of McKinley, State of New Mexico.

8. The Coal Company filed a timely protest to Assessment No. 151392.

B.

1. The Coal Company protested the assessment of New Mexico gross receipts tax upon the basis that it had been denied deduction for receipt from sales of coal which, it claims, were transaction in interstate commerce. The Taxpayer relies on §§ 72-16A-14.10 NMSA 1958 [sic] and 7-9-55 NMSA 1978 and Gross Receipts Tax Regulation 3(F):10.

2. The assessment of additional gross receipts taxes is predicted [sic] upon the inclusion in the gross receipts from sales made by the Taxpayer from its McKinley mine

to out-of-state customers, primarily those located in the State of Arizona. Those sales were all made f.o.b. McKinley Mine, McKinley County, New Mexico, with title passing to the out-of-state customer when the coal is loaded into conveyances at the mine.

3. In support of its position the Taxpayer introduced into evidence six "Coal Agreement Contracts"—with five Arizona customers—which contracts provided for the furnishing of a given supply of coal at a particular rate of delivery for an extended period of time. The most discussed contract, with supplements, was the one with Arizona Public Service Company ("APS") where APS contracted to acquire coal for its electric generation station at Cholla, Arizona. The contract was negotiated over a prolonged period of time. Negotiations were conducted in Phoenix, Kansas City, Chicago and other places. Testimony does not show where the contract was signed by the parties. Under that contract, there was a contractual guarantee to APS that the Taxpayer had sufficient coal to meet the requirements of the purchaser and it provided that the Taxpayer would not in the future subsequently contract to sell coal to others that would reduce the amount of coal remaining for APS. To this end, the Taxpayer formally dedicated a geographic area portion of its McKinley coal mine to this particular customer. The contract provided that all coal delivered by the Taxpayer to APS shall be supplied from the Taxpayer's McKinley mine and title to all coal supplied shall pass to APS when coal is loaded in rail cars at the mine. The contract gave APS the right to change the point at which title to the coal passes and a supplement provided that APS shall have the right to divert coal to the Four Corners generating station in New Mexico. Apparently, APS never has diverted coal to the Four Corners Plant nor has it changed the place where title passes. APS also had the right, acting as agent for the Taxpayer, to sell coal to others.

4. Three of the coal agreement contracts with Arizona customers (including APS) provided for "unit train" transportation, apparently because of the volume of coal being transported. A unit train is a train which, as a whole, stays as a unit. The locomotives, hopper cars and caboose

remain as a unit. The train as a unit comes to the coal mine where coal is loaded in the hopper cars, the train goes to its destination where the cars are unloaded and the train returns to the mine. At the mine, there is a spur or loop track which enables the train to turn around. These customers negotiated with the Santa Fe Railroad the terms and conditions of transporting the coal in unit trains in order to achieve the lowest freight rate. In these cases, the railroad company owns the locomotives and cabooses used in the unit trains but, because of the economics involved, the customers apparently own the hopper cars in the unit trains. The customers pay the railroad for the transportation service.

5. At sometime, and it is not clear when, the Taxpayer constructed, or had constructed, facilities to sample, weigh, and load coal into unit trains. These facilities included a coal storage area located between the mine operation and the loading operation. The storage area could contain as much as one hundred thousand tons of coal. When the unit train arrives, the coal is drawn from the storage area mechanically and by gravity to a belt. The belt leads to a vertical loading device which is mounted above the track where the train comes in. The cars pass under the loader which loads the railroad car. As part of the delivery process, coal passes over certain scales of weighing mechanisms prior to being placed in the car.

6. Prior to the time the Taxpayer had facilities for loading unit trains, all deliveries of coal were made at the Taxpayer's original loading site. At that facility, coal was loaded into hopper cars and the loaded cars remained in the area until the Santa Fe railroad picked up the car or cars. If, after cars are loaded, a specific customer is unable to accept the loaded cars, the cars can be sent to a different customer. The evidence does not show how long the loaded cars remained in the area before the railroad moved out the car or cars. This original loading site apparently was used for all loading other than loading unit trains.

7. Three of the contracts introduced into evidence (which involved two Arizona purchasers) did not call for

unit train loading and under these contracts the loading occurred at the original loading site. These contracts provided that title to coal passed from the seller to the buyer at the time the hopper cars were loaded. In at least one occasion, cars loaded for the Flintkote Co. were diverted from a Flintkote plant to an APS operation in Arizona.

8. In addition to sales made under the six contracts introduced in evidence, the Taxpayer made extensive sales to others some of whom were out of New Mexico and out of Arizona customers. In such cases, coal was loaded at the original loading site into hopper cars or trucks. With one exception, title passed from seller to buyer when the car or truck was loaded. The evidence does not show the number of sales, or the applicable periods of time when sales occurred, in connection with these other sales.

9. At the hearing the Taxpayer gave estimates of sales of coal to its customers but the evidence does not show the amounts received from such sales or the applicable periods of time when sales of coal occurred in connection with unit trains.

10. (a) In summary, the Coal Company loaded all of the coal which it severed and sold from lands within McKinley County, New Mexico into conveyances at the site of the Coal Company's mining operations within McKinley County, New Mexico. The conveyances consisted of trucks and railroad cars. None of the conveyances were owned or controlled by the Coal Company, or by any person, firm or corporation having common ownership or a parent-subsidiary relationship with the Coal Company. Arrangements for the provision of the conveyances to receive the coal were made by the buyers of the coal. All of the charges for use of the conveyances and for the transportation of the coal away from the Coal Company's mining site were paid by the buyers of the coal.

(b) After the Coal Company loaded said coal sold into said conveyances, the conveyances were removed from the Coal Company's premises in McKinley County, New Mexico by others than the Coal Company, and were thereafter transported by other than the Coal Company to other places specified by the buyers of the coal, some

within and some beyond the State of New Mexico. Some of the coal was transported to locations within the States of Missouri, Texas, Arizona, and California, as well as to other locations within the State of New Mexico.

(c) The Coal Company sold all, or virtually all of its coal, upon written contracts and not oral contracts. Six such contracts were admitted into evidence. Each of the Coal Company's contracts for the sale of coal which were admitted into evidence provided that the title to all coal sold will pass from the Coal Company to the buyer when the coal is loaded into railroad cars at the Coal Company's mining site in McKinley County, New Mexico; and testimony rendered by witnesses for the Coal Company established that the same provision with respect to the passage of title to coal sold prevailed in the other contracts referred to but not offered in evidence. The various contracts were negotiated and executed in various states, including New Mexico, and the billings for coal sold and the receipts of payments therefor were effected in the States of New Mexico and Colorado. After the coal sold was loaded into the conveyances, the risks of loss, damage and disappearance of the coal was solely borne by the buyers.

11. The Coal Company paid use taxes to the State of Arizona based upon the value of some of the coal sold at its mining site in McKinley County, New Mexico and thereafter transported into the State of Arizona. The Coal Company did not pay any transaction privilege (commonly known as sales) tax to the State of Arizona. The Coal Company did not pay any sales or use taxes to the States of Missouri, Texas, or California on account of coal sold at its mining site in McKinley County, New Mexico and thereafter transported by the buyers of the coal into those states. The Coal Company billed customers for, and has been reimbursed by the buyers of the coal for said use taxes paid to the State of Arizona.

12. The Coal Company has applied for a refund of the Arizona use taxes paid, and has requested the State of Arizona to withhold action upon that application pending the determination of this New Mexico protest proceeding.

C.

1. The Coal Company protested the assessement of New Mexico compensating tax upon the basis that it had been denied deduction of the 50 percent of the value of its dragline equipment to which it claims to be entitled pursuant to §§ 72-16A-15 NMSA 1953 and 7-9-77 NMSA 1978 and Gross Receipts Tax Regulations 14.17:4 and 62:4.

2. The Coal Company does not contend that any of its dragline equipment upon the value of which New Mexico compensating tax was assessed in Assessment No. 151392 consisted of agricultural implements, farm tractors or aircraft, nor that any tangible personal property of the nature of a dragline was traded-in or the subject of a trade-in allowance at the time its dragline equipment was bought.

3. Each of the Coal Company's four units of dragline equipment is substantially identical to the others. An example is shown in Taxpayer's Exhibit 5. Each is a huge machine powered by outside sources–electricity. The electricity is furnished by trailing electric cables carrying 6900 volts connected to fixed sources of electric power. Each is equipped with a boom at least 320 feet long with cable hoists to operate a suspended 55 cubic yard bucket cabable [sic] of containing 260,000 pounds for digging and casting overburden. Each is about 30 stories high and weighs about 6,500,000 pounds.

Taxpayer only challenges the portions of Finding A7 which includes "employing labor and equipment for the severance and removal of coal and its crushing, screening, blending, sale, and loading of said coal all within the County of McKinley, State of New Mexico". It challenges D4 and the portion challenged only includes "the customers apparently own the hopper cars and the unit trains." It also challenges portions of B10 which includes "including New Mexico." The following statutes and Department Gross Receipt Regulations (Regulations) are pertinent to our decision in this case:

7-9-4, N.M.S.A.1978. **Imposition and rate of tax; denomination as "gross receipts tax."**

A. For the privilege of engaging in business, an excise tax equal to three and three-fourths percent of gross receipts is imposed on any person engaging in business in New Mexico.

B. The tax imposed by this section shall be referred to as the "gross receipts tax."

7-9-7, N.M.S.A.1978. **Imposition and rate of tax; denomination as "compensating tax."**

A. For the privilege of using property in New Mexico, there is imposed on the person using property an excise tax equal to three and three-fourths percent of the value, at the time of acquisition or of introduction into the state, whichever is later, or of conversion to use by the manufacturer of property that was:

(1) manufactured by the person using the property in the state;

(2) acquired outside this state as the result of a transaction that would have been subject to the gross receipts tax had it occurred within this state; or

(3) acquired as the result of a transaction which was not initially subject to the compensating tax imposed by Paragraph (2) of this subsection or the gross receipts tax but which transaction, because of the buyer's subsequent use of the property, should have been subject to the compensating tax imposed by Paragraph (2) of this subsection or the gross receipts tax.

B. For the privilege of using services rendered in New Mexico, there is imposed on the person using such services an excise tax equal to three and three-fourths percent of the value of the services at the time they were rendered. The services, to be taxable under this subsection, must have been rendered as the result of a transaction which was not initially subject to the gross receipts tax but which transaction, because of the buyer's subsequent use of the services, should have been subject to the gross receipts tax.

C. The tax imposed by this section shall be referred to as the "compensating tax."

7-9-8, N.M.S.A.1978. **Presumption of taxability and value.**

A. To prevent evasion of the compensating tax and the duty to collect it, it is presumed that property bought or sold by any person for delivery into this state is bought or sold for a taxable use in this state.

B. In determining the amount of compensating tax due on the use of property, it is presumed, in the absence of preponderant evidence of another value, that the value means the total amount of money or the reasonable value of other consideration paid for property exclusive of any type of time-price differential. However, in an exchange in which the amount of money paid does not represent the value of the property or property and service purchased, the compensating tax shall be imposed on the reasonable value of the property or property and service purchased.

C. In determining the amount of compensating tax due on the use of a service, it is presumed, in the absence of preponderant evidence of another value, that the value means the total amount of money or the reasonable value of other consideration paid for the service exclusive of any type of time-price differential. However, in an exchange in which the amount paid does not represent the value of the service purchased, the compensating tax shall be imposed on the reasonable value of the service purchased.

7-9-22, N.M.S.A.1978. **Exemption; gross receipts tax; vehicles.**

Exempted from the gross receipts tax are the receipts from selling vehicles on which a tax is imposed by Section 64-11-15 NMSA 1953 and on vehicles subject to registration under Section 64-3-12.3 NMSA 1953.

7-9-23, N.M.S.A.1978. **Exemption; compensating tax; vehicles.**

Exempted from the compensating tax is the use of vehicles on which the tax imposed by Section 64-11-15 NMSA

1953 has been paid and on the use of vehicles subject to registration under Section 64-3-12.3 NMSA 1953.

7-9-55, N.M.S.A.1978. **Deduction; gross receipts tax; transactions in interstate commerce.**

Receipts from transactions in interstate commerce may be deducted from gross receipts to the extent that the imposition of the gross receipts tax would be unlawful under the United States constitution.

Receipts from transmitting messages or conversations by telegraph, telephone or radio other than from one point in this state to another point in this state and receipts from the sale of radio or television broadcast time when the advertising message is supplied by or on behalf of a national or regional seller or advertiser not having its principal place of business in or being incorporated under the laws of this state, may be deducted from gross receipts. Commissions of advertising agencies from performing services in this state may not be deducted from gross receipts under this section.

7-9-77, N.M.S.A. 1978. **Deduction; compensating tax.**

A. Fifty percent of the value of agricultural implements, farm tractors, aircraft or vehicles that are not required to be registered under the Motor Vehicle Code [Chapter 66 NMSA 1978] may be deducted from the value in computing the compensating tax due. Any deduction allowed under Subsection B of this section is to be taken before the deduction allowed by this subsection is computed.

B. That portion of the value of tangible personal property on which an allowance was granted to the buyer for a trade-in of tangible personal property of the same type that was bought may be deducted from the value in computing the compensating tax due.

G.R. REGULATION 3 (F):10–DELIVERY OUTSIDE NEW MEXICO–

Receipts of New Mexico sellers from sales of property to New Mexico residents who request delivery to be made

outside New Mexico are subject to the Gross Receipts Tax.

Receipts of New Mexico sellers from sales of property to nonresidents of New Mexico where delivery is made outside New Mexico by seller's vehicle, common carrier, or U.S. Mail are receipts from transactions in interstate commerce and are deductible from the seller's gross receipts pursuant to Section 7-9-55, and regulations thereunder.

Example 1: T, a Tucumcari appliance dealer, sells a freezer to a restaurant in Muleshoe, Texas. If T delivers the freezer to Muleshoe in his own truck or if T delivers the freezer to Muleshoe by common carrier, T's receipts from the sale may be deducted from his gross receipts. Section 7-9-55. However, if the buyer picks up the freezer at T's Tucumcari place of business, T's receipts are not deductible because the sale was fully consummated in New Mexico.

G.R. REGULATION 55:2–SALES IN INTERSTATE COMMERCE–

Receipts of New Mexico sellers from sales of property to New Mexico residents who request delivery to be made out-of-state are not transactions in interstate commerce, and are subject to Gross Receipts Tax.

Receipts of New Mexico sellers from sales of property to nonresidents of New Mexico who accept delivery of the property in New Mexico are not transactions in interstate commerce, and are subject to Gross Receipts Tax.

Receipts of New Mexico sellers from sales of property to nonresidents of New Mexico where delivery is made out-of-state by seller's vehicles, U.S. Mail, or common carrier are receipts from transactions in interstate commerce and such receipts may be deducted from the gross receipts of the seller. See G.R. REGULATION 3(F):10.

G.R. REGULATION 62:4–MINING EQUIPMENT–

The items of mining equipment listed below are "vehicles" as that term is used in this section and Section 7-9-77. Therefore, the fifty percent (50%) deduction provisions of

those sections apply to receipts derived from the sale of or the use of such machines. A trade-in deduction pursuant to Section 7-9-71, if applicable, must be taken before the deduction allowed by this section is computed.

The following machines are "vehicles" within the meaning of this section and Section 7-9-77:

Shuttle cars are self contained mobile mining machines mounted on rubber tire wheels, used to transport broken ore from the ore face in the mine to a loading point, where the ore is loaded into an underground train.

Undercutting machines are self-contained mobile mining machines mounted on rubber tire wheels. These machines are used to under cut or bottom cut the ore face prior to drilling.

Mining drills are self-contained mobile mining machines mounted on rubber tire wheels used to drill holes above the undercut prior to shooting.

Loading machines are self-contained mobile mining machines mounted on tractor treads and are similar to front end loaders. They are used to load ore into shuttle cars.

Electric shovels are self-contained mobile mining machines mounted on tractor treads and are used in open pit mining operations to load ore and waste material into dump trucks.

The following machines are *not* "vehicles" within the meaning of this section and Section 7-9-77:

Diesel locomotives operated on rails used in underground mining operations.

Cars used with diesel locomotives in underground mining operations.

1. JURISDICTION

The Department challenges our authority to review this case on the following grounds: 1. That Taxpayer has failed to file a complaint on appeal as required by section 7-1-25(B), N.M.S.A.

1978 (1982 Repl. Pamph.); 2. Taxpayer's brief fails to specify any of the exclusive grounds upon which to set aside the decision and order provided by § 7-1-25(D), N.M.S.A. 1978 (1982 Repl. Pamph.); 3. Taxpayer did not assert at the hearing that the assessment violated the Department's regulations and therefore it may not so plead in this appeal.

We have reviewed the record and the briefs and conclude that Taxpayer has sufficiently and substantially complied with the pertinent appellate rules. We have jurisdiction in this matter.

II. GROSS SALES TAX

The Department assessed gross receipt taxes, compensating taxes, penalties and interest against Taxpayer. The assessment was for Taxpayer's activities in McKinley County including sale of coal to non-residents of New Mexico and the use of four draglines. The assessments were made pursuant to §§ 7-9-4 and 7-9-7, *supra*.

Taxpayer challenges this assessment generally claiming that the activities for which the taxes are imposed constitute interstate commerce and that the tax violates the Commerce Clause of the Federal Constitution (Article 1, § 8, clause 3). To support this position Taxpayer relies mainly on § 7-9-77 and Regulation 62:4, *supra*. The Department contends that the tax imposed is consistent with the gross receipt tax law of New Mexico and specifically §§ 7-9-2, 7-9-5, N.M.S.A. 1978, 7-9-4, 7-9-55, *supra*, and Regulations 3F:10 and 55:2, *supra*. The Department further contends that these taxes are compatible with the Federal Constitution Commerce Clause.

Since the taxes challenged by Taxpayer constitute deductible items we shall set forth the duty of Taxpayer in this situation. First, pursuant to section 7-9-5, *supra*, a presumption of taxability arises. Second, in *Reed v. Jones*, 81 N.M. 481, 468 P.2d 882 (Ct.App.1970), this court stated:

> The burden is on the taxpayer to establish clearly his right to the deduction and the intention to authorize the deduction claimed by the taxpayer must be clearly and unambiguously expressed in the statute. (citations omitted).
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> * * * * * *
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> In speaking on exemptions from taxation the United States Supreme Court stated in *Hoge v. Railroad Co.*, 99 U.S. 348, 25 L.Ed. 303 (1879), the following:
>
> "* * * But though this power is recognized, it is accompanied with the qualification that the intention of the legislature to grant the immunity must be clear beyond a reasonable doubt. It cannot be inferred from uncertain phrases or ambiguous terms. The power of taxation is an attribute of sovereignty, and is essential to every independent government. Stripped of this power, it must perish. Whoever, therefore, claims its surrender must show it in language which will admit of no other reasonable construction. If a doubt arise [sic] as to the intent of the legislature, it must be solved in favor of the State."

81 N.M. at 482-83, 468 P.2d 882.

Any exception or rights to deductions must be contained within the expressed letter or necessary scope of the exempting language. *See McKee v. Bureau of Revenue*, 63 N.M. 185, 315 P.2d 832 (1957).

In order for us to decide the issue at hand we must consider certain factors relating to the activities of Taxpayer in McKinley County, New Mexico: 1. We consider the matter of when title to the coal sold passed to the buyer; 2. We consider the matter of agency on the part of the transporter; and 3. We consider, the theory as to whether gross receipt taxes on the privilege of Taxpayer to do business in New Mexico violates the Federal Commerce clause when it is applied to an interstate activity with a substantial nexus to New Mexico.

1. TITLE OF COAL SOLD BY TAXPAYER

In each of the contracts with out-of-state buyers, title to the coal and risk of loss passed from Taxpayer to its customers

after the coal was loaded onto the appropriate train, at the mine. The cars in which the coal was loaded were owned by the buyer. After the coal was loaded the transporter was in custody and control of the coal until it reached the buyers' site of use. The official weight of the coal was determined at the McKinley mine when it was loaded into the railroad hopper cars. There is substantial evidence, and there are sufficient findings, that title of the coal did pass to Taxpayer's customers when it was loaded in cars or trucks in New Mexico. Therefore, the question is whether, under the facts and circumstances of this case, passage of title in New Mexico is a matter to be considered as a factor justifying the imposition of the gross receipts tax.

Taxpayer argues that the passage of title approach is an attempt to avoid a collision with the Commerce Clause. We disagree. In *State Tax Com'n of Utah v. Pacific States Gas Iron Company*, [sic] 372 U.S. 605, 83 S.Ct. 925, 10 L.Ed.2d 8 (1963) the court held that where a vendor sells property, and passage of title and delivery occurs in the vendor state, that state can levy and collect the sales tax on that transaction.

Regulation 3(F):10, *supra*, provides that if an out-of-New Mexico buyer picks up the subject of his purchase at the New Mexico vendor's place of business, the vendor's gross receipts are not deductible. Regulation 55:2, *supra*, provides that receipts of New Mexico sellers from non-residents of New Mexico who accept delivery in New Mexico are subject to the tax. Similarly, in *Baskin-Robbins Ice Cream Co. v. Revenue Div.*, 93 N.M. 301, 599 P.2d 1098 (Ct.App.1979), the court stated as follows:

> Taxpayer is not engaged in interstate commerce. The tax here imposed is conditioned on Creamland's local business of manufacturing and selling ice cream products in New Mexico. It is not a tax imposed on the importation of property or the rendering of services outside the State; neither is it a tax measured by income derived from manu-

> facturing and selling ice cream products in any other state; nor is the tax different from that assessed and paid by local taxpayers in manufacturing and selling ice cream products for others.

93 N.M. at 306, 599 P.2d 1098.

In *Miami Copper Co. Etc. v. State Tax Com'n*, 121 Ariz. 150, 589 P.2d 24 (Ct.App.1978) the Arizona Court of Appeals stated as follows:

> It is well established, however, that intent to export to another nation or state does not alone determine whether in fact the goods have become exports or have entered interstate commerce. *See Kosydar v. National Cash Register*, 417 U.S. 62, 94 S.Ct. 2108, 40 L.Ed.2d 660 (1974); *Coe v. Errol*, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715 (1886).
>
> The reasoning behind the rule is well stated in *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237 (1922). ". . . If the possibility, or *indeed certainty*, of exportation of a product or article from a state, determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other states at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, the coal yet unmined because they are in varying percentages destined for and surely to be exported to states other than those of their production. [Emphasis added.]" 260 U.S. at 259-60, 43 S.Ct. at 86, 67 L.Ed. at 243.

From the foregoing, we conclude that the taxpayer's mineral products did not enter interstate commerce at any

> time before completion of the smelting process in Arizona. *A taxpayer may not immunize from taxation the value added to his product merely because it was committed to eventual out-of-state consumption or sale before it was subjected to local processing or manufacture.* Taxpayer's copper did not enter interstate commerce as that term is contemplated by A.R.S. § 42-1316 until it began its journey to the New Jersey and Texas refineries. [Emphasis added.]

589 P.2d at 28-29. *See also State Board of Equalization v. Blind Bull Coal Co.*, 55 Wyo. 438, 101 P.2d 70 (1940), (Wyoming Supreme Court gave examples of activities that precede interstate transportation and which were treated as taxable local events.)

We conclude that the question of title and delivery of coal in New Mexico is a positive factor upon which to determine that the tax does not interfere with the Commerce Clause of the U.S. Constitution.

2. AGENCY

The reviewing officer made findings showing that he considered it to be important whether the transporter of the coal was the buyers' agent. Evidence at the hearing showed that the coal was loaded at the mine into rail cars or trucks. In either case, the means of conveyance was that of the buyers. There was no evidence that coal was transported by Taxpayer, or that a common carrier was employed. *See* Finding Part A, 10(a), *supra*.

Notwithstanding the findings, Taxpayer contends that agency is not significant. We disagree. *See Standard Oil Co. v. Johnson*, 24 Cal.2d 40, 147 P.2d 577 (Cal.1944). The court in *Standard Oil* stated that whether delivery to the carrier constituted delivery to the buyer depended upon intentions of the parties, as ascertained from the contract and other factors in the case. 147 P.2d at 580. In the case at bar, the buyers owned the

hopper cars or trucks and arranged for the transportation of the coal. Furthermore, we concluded above that title passed when the coal was loaded into the buyers' cars or trucks.

We conclude that the coal did not enter interstate commerce until after title and delivery passed. The railroad or the respective transporter for the buyers was their agent, designated to accept delivery of the coal. Applying agency principles, the delivery of coal to the agent was in effect delivery to the buyer. Accordingly, agency becomes an important factor for determination of this matter.

3. CONFLICT WITH THE COMMERCE CLAUSE

Consideration of whether a state imposed tax runs afoul of the Commerce Clause of the Federal Constitution is governed by the four part test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed. 2d 326 (1977). To be sustained, a state tax upon items connected with interstate commerce must: (A) be applied to an activity with a substantial nexus with the taxing state; (B) be fairly apportioned; (C) not discriminate against interstate commerce; and (D) be fairly related to the services provided by the state. 430 U.S. at 279, 97 S.Ct. at 1079. We will examine each prong of the test.

A. Substantial Nexus With the Taxing State

The first requirement for valid imposition of a state tax is that the activity taxed has a substantial nexus with the taxing state. *Complete Auto Transit, Inc. v. Brady, supra.* In the case at bar gross receipts taxes were assessed against Taxpayer for the sale of coal. The New Mexico Supreme Court stated in *Bennett v. Western Sur. Co.*, 95 N.M. 13, 14, 618 P.2d 357 (1980), that " 'sale' means the passing of title and possession of property for money which the buyer pays, or promises to pay.' " The record shows that title to and possession of the coal passed to the buyers in New Mexico. Moreover, delivery to the buyers' conveyances was made in New Mexico, and the

buyers' legal obligations became fixed in the state. Accordingly, evidence in the record supports the determination that the activity taxed had a substantial nexus with New Mexico.

B. The Tax Must Be Fairly Apportioned

The second prong of the test in *Complete Auto Transit* is that taxes imposed upon interstate commerce must be fairly apportioned. The thrust of this requirement is that while interstate commerce may be required to bear its fair share of the cost of state government, the tax cannot amount to a trade barrier. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed. 2d 884 (1981). The Coal Company contends that because the New Mexico gross receipts tax is unapportioned it requires the Coal Company to pay more than a fair share.

In *General Motors Corporation v. Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964), the United States Supreme Court addressed the imposition of a gross receipts tax as follows:

> A careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. Where, as in the instant case, the taxing State is not the domiciliary State, we look to the taxpayer's business activities within the State, i.e., the local incidents, to determine if the gross receipts from sales therein may be fairly related to those activities. As was said in *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444, 61 S.Ct. 246, 250, 85 L.Ed. 267 (1940), "[t]he simple but controlling question is

> whether the state has given anything for which it can ask return."

337 U.S. at 440-41, 84 S.Ct. at 1568.

In the case at bar, the tax was imposed on Taxpayer's gross receipts derived from the sales of coal. As was set out above, the delivery and sale of the coal was consummated within the borders of New Mexico. Therefore, according to the authority cited, and the facts of this case, there is ample evidence to support a determination that the tax was fairly apportioned.

C. The Tax Cannot Discriminate Against Interstate Commerce

The third requirement of the test in *Complete Auto Transit* is that the tax cannot discriminate against interstate commerce. The purpose for this prong of the test is to ensure that intrastate and interstate commerce stand on the same footing. Accordingly, no state is permitted to impose taxes which discriminate against interstate commerce by providing direct commercial advantage to local enterprises. *Boston Stock Exch. v. State Tax Com'n.*, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977). *See also Commonwealth Edison Co. v. Montana, supra.* Our review of the record failed to produce, and the parties do not point us to, any evidence that intrastate and interstate coal mining operation [sic] are taxed in a disparate fashion. Therefore, we find nothing which refutes the determination that the tax did not discriminate against interstate commerce.

D. The Tax Must Be Fairly Related To the Services Provided By the State

The fourth and final prong of the test in *Complete Auto Transit* is that the tax imposed must bear a fair relation to the services provided by the state. The Court in *Commonwealth Edison v. Montana* explained the operation of this requirement as follows:

This Court has indicated that States have considerable latitude in imposing general revenue taxes. The Court has, for example, consistently rejected claims that the Due Process Clause of the Fourteenth Amendment stand as a barrier against taxes that are "unreasonable" or "unduly burdensome." See, e.g., *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 94 S.Ct. 2291, 41 L.Ed.2d 132 (1974); *Magnano Co. v. Hamilton*, 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109 (1934); *Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44, 41 S.Ct. 219, 65 L.Ed. 489 (1921). Moreover, there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. Instead, our consistent rule has been:

> "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
>
> "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-522, 57 S.Ct. 868, 878-79, 81 L.Ed. 1245 (1945) (citations omitted).

See *St. Louis & S.W.R. Co. v. Nattin*, 277 U.S. 157, 159, 48 S.Ct. 438, 72 L.Ed. 830 (1928); *Thomas v. Gay*, 169 U.S. 264, 280, 18 S.Ct. 340, 346, 42 L.Ed. 740 (1898).

There is no reason to suppose that this latitude afforded the States under the Due Process Clause is somehow divested by the Commerce Clause merely because the taxed activity has some connection to interstate commerce;

particularly when the tax is levied on an activity conducted within the State. "The exploitation by foreign corporations [or consumers] of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations." *Ford Motor Co. v. Beauchamp*, 308 U.S. 331, 334-335, 60 S.Ct. 273, 275, 84 L.Ed. 304 (1939); *see also Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585 (1949). To accept appellants' apparent suggestion that the Commerce Clause prohibits the States from requiring an activity connected to the interstate commerce to contribute to the general cost of providing governmental services, as distinct from those costs attributable to the taxed activity, would place such commerce in a privileged position. But as we recently reiterated, " '[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.' " *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 108, 95 S.Ct. 1538, 1543, 44 L.Ed.2d 1 (1975), quoting *Western Live Stock v. Bureau of Revenue*, 303 U.S., [250] at 254, 58 S.Ct. [546] at 548. [82 L.Ed. 823]. The "just share of state tax burden" includes sharing in the cost of providing "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.' " *Exxon Corp. v. Wisconsin Dept. Revenue*, 447 U.S. 207, 228, 100 S.Ct. 2109, 2123, 65 L.Ed.2d 66, quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S., [434] at 445, 99 S.Ct. 1813, 1819-20. [60 L.Ed.2d 336]. *See Washington Revenue Dept. v. Association of Wash. Stevedoring Cos.*, 435 U.S. [734] at 750-751, 98 S.Ct., [1388] at 1399 [55 L.Ed.2d 682]; *id.* at 764, 98 S.Ct. at 1406 (POWELL, J., concurring); *General Motors v. Washington*, 377 U.S. 436, 440-441, 84 S.Ct. 1564, 1567-68, 12 L.Ed.2d 430 (1964).

101 S.Ct. at 2956-57.

In the case at bar the record demonstrates that the tax revenues were used to support New Mexico's services to Taxpayer, their mine and employees, and to benefit the economic,

legal, political and social systems afforded every resident, whether citizen or not. Accordingly, we find sufficient evidence to support the determination that the tax was related to the service provided.

E. SUMMARY

Our application of the test in *Complete Auto Transit* reveals that the business of Taxpayer taxed occurs entirely within McKinley County, New Mexico (criterion 1). The tax is applied equally to interstate and intrastate commerce (criterion 2). The tax is limited to a base which relates only to Taxpayer's activities within McKinley County, New Mexico, and does not discriminate against interstate commerce because its application is to activities conducted, and revenues realized, by Taxpayer wholly within New Mexico (criterion 3). And finally, the tax is intimately related to "services" provided by the State: the availability of the coal itself, as well as the labor force, roads, environment and protection afforded to Taxpayer by the State (criterion 4). The New Mexico Gross Receipts Tax Act, in its application to Taxpayer meets every test of validity prescribed by the federal constitution and courts.

Considering all the factors of activities of Taxpayer, including the sale of the coal, the passage of the title, the matter of agency and other factors incidental to Taxpayer's activities, and based upon authorities which we have reviewed, we hold that the imposition of the taxes did not impermissibly interfere with the Commerce Clause of the Federal Constitution. We conclude that the decision of the Department was neither capricious nor arbitrary and that it was made in accordance with the facts and the law applicable to the case at bar.

III. COMPENSATING TAXES ON DRAGLINES

The Department assessed compensating taxes with interest and penalty on the use of four draglines, pursuant to § 7-9-7,

supra. The assessment was protested by Taxpayer but upheld by the Hearing Examiner. Taxpayer challenges the assessment on grounds that it is entitled to a deduction provided by § 7-9-77, *supra*, and Regulation 66:4. The argument of Taxpayer is that if draglines are not vehicles under the Motor Vehicle Code they should be considered vehicles under § 7-9-77 and Regulation 62:4. We would agree with this statement if we accepted the premise that the language of the statute is plain in the sense that it can be reasonably read only as Taxpayer would read it. But we do not agree with that premise. "The notion that because words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." *U.S. v. Monia*, 317 U.S. 424, 63 S.Ct. 409, 87 L.Ed. 376 (1943) (Frankfurter, Justice, dissenting).

Our duty is to find that interpretation which can most fairly be said to be imbedded in the statute in the sense of being most harmonious with its scheme and with the general purpose that the Legislature manifested. The question is whether draglines are vehicles under § 7-9-77, *supra*, and the pertinent regulations. The evidence in respect to the draglines is clear and uncontradicted. The Hearing Examiner's findings are not challenged in respect to draglines. Therefore, the facts of the Hearing Examiner are the facts before this court. Our conclusion by *Kaiser Steel Corp. v. Revenue Division*, 96 N.M. 117, 628 P.2d 687 (Ct.App.) *cert. denied*, 96 N.M. 116, 628 P.2d 686 (1981), is controlling in the case at bar. This court said:

> From all the foregoing, we find it impossible to conclude that the continuous miner and dragline are "vehicles" under the Motor Vehicle Code. *Accord Gibbons & Reed Company v. Bureau of Revenue*, 80 N.M. 462, 457 P.2d 710 (1969).
>
> * * * * * *
>
> Because the machine must, in the first instance, be a 'vehicle' in order to qualify under either exception, see *Gibbons & Reed Company v. Bureau of Revenue, supra*,

> and, as shown above, neither the dragline nor continuous miner can be so classified, under § 66-1-4(B)(71), neither are 'vehicles not required to be registered' within the meaning of § 7-9-77. Further, as to the requirements of § 66-3-1(B), a finding that a machine 'moves' or is 'mobile' does not in itself support a conclusion that the machine can be 'driven or moved upon a highway' for any purpose. In fact, the evidence here is to the contrary.
>
> * * * * * *
>
> Neither the dragline or continuous miner are 'vehicles' exempt from registration under the Motor Vehicle Code.

96 N.M. at 122-23, 628 P.2d 687. The court in *Kaiser* also noted the following:

> A similar case was presented in *Gibbons & Reed Company v. Bureau of Revenue*, 80 N.M. 462, 457 P.2d 710 (1969), which held that a piece of mining equipment called a 'mole' was not 'special mobile equipment' because it did not come within the general descriptive terms of the section. [§ 64-1-12, N.M.S.A. 1953 Comp., now § 66-1-4(B)(60), N.M.S.A.]. The 'mole' which weighed approximately one hundred tons, was used to move employees and supplies in and out of a tunnel and to remove excavated material from the tunnel.

96 N.M. at 123 n.1, 628 P.2d 687.

We conclude that the draglines are not vehicles under either § 7-9-77 or Regulation 42:10, *supra*. The decision of the Department in denying deduction for compensating tax and in assessing the compensating tax was neither arbitrary nor capricious, but made in accordance with law. The decision and order of the Department is affirmed.

Appellate costs shall be paid by the Taxpayer.

IT IS SO ORDERED.

/s/ Ramon Lopez, Judge
RAMON LOPEZ, JUDGE

WE CONCUR:

/s/ William R. Hendley, J. (Concurring in result only.)
WILLIAM R. HENDLEY

/s/ Thomas A. Donnelly, J.
THOMAS A. DONNELLY

APPENDIX C

IN THE COURT OF APPEALS OF
THE STATE OF NEW MEXICO

Monday, February 21, 1983

No. 5910
D.C. No.

PITTSBURGH [sic] & MIDWAY
COAL MINING COMPANY,
Petitioner-Appellant,

vs.

REVENUE DIVISION OF THE TAXATION
AND REVENUE DEPT. OF THE STATE
OF NEW MEXICO,
Defendant-Appellee.

RAMON LOPEZ
Presiding Judge

WILLIAM HENDLEY
THOMAS DONNELLY
Judges

In this cause, a motion for rehearing having been filed by appellant, and consideration having been had by all of the members of the original panel,

IT IS ORDERED that the motion for rehearing be DENIED.

/s/ Ramon Lopez
RAMON LOPEZ
Presiding Judge

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 14,841

PITTSBURGH [sic] & MIDWAY
COAL MINING COMPANY,
Petitioner,
vs.
REVENUE DIVISION, TAXATION
AND REVENUE DEPARTMENT OF
THE STATE OF NEW MEXICO,
Respondent.

Proceeding on Certiorari

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is hereby granted, and the writ of certiorari shall issue from this Court as prayed for in the petition.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

No. 14,841

PITTSBURGH [sic] & MIDWAY
COAL MINING COMPANY,
Petitioner,

vs.

REVENUE DIVISION, TAXATION
AND REVENUE DEPARTMENT OF
THE STATE OF NEW MEXICO,
Respondent.

WRIT OF CERTIORARI

THE STATE OF NEW MEXICO

TO: Court of Appeals

GREETING:

WHEREAS, the Petitioner, through its attorneys, Montgomery & Andrews, John B. Pound, Santa Fe, New Mexico, and Donald E. Willson, Denver, Colorado, did apply to this Court on March 11, 1983 for its review of the decision handed down by the Court of Appeals on February 3, 1983 in Cause No. 5910 entitled Pittsburgh [sic] & Midway Coal Mining Company vs. Revenue Division, Taxation and Revenue Department of the State of New Mexico; and

WHEREAS, the Supreme Court gave notice to the Court of Appeals on March 11, 1983, in compliance with Rule 28(f) of the Rules of Appellate Procedure for Civil Cases, that an application for writ of certiorari had been filed in the above entitled cause; and

WHEREAS, a copy of the application for writ of certiorari has been filed in the above entitled cause.

NOW, THEREFORE, the writ of certiorari is hereby issued, and the Court of Appeals is hereby ordered to proceed no

further in Cause No. 5910 pending the further order of the Court.

WITNESS, The Hon. H. Vern Payne, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 22nd day of April, 1983.

(S E A L)

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX E

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

Tuesday, May 3, 1983

No. 14,841

PITTSBURGH [sic] & MIDWAY
COAL MINING COMPANY,
Petitioner,

vs.

REVENUE DIVISION, TAXATION
AND REVENUE DEPARTMENT OF
THE STATE OF NEW MEXICO,
Respondent.

Proceeding on Certiorari

This matter having heretofore been submitted and taken under advisement, and a writ of certiorari having issued from this Court on April 22, 1983;

NOW, THEREFORE, IT IS ORDERED that the writ of certiorari heretofore issued in this cause on April 22, 1983, is hereby quashed as having been improvidently issued.

IT IS FURTHER ORDERED that the Record in Cause No. 5910 is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX F

Relevant Contract Provisions

4.1 **Delivery.** All coal delivered by Seller to Buyer hereunder shall be supplied from Seller's McKinley Mine except as provided in Section 4.2 hereof. Title to all coal supplied hereunder shall pass from Seller to Buyer when such coal has been loaded into railroad cars at Seller's mine for delivery to Buyer.

Contract provision relating to passage of title of coal contained in the following contracts:

1. Coal Supply Agreement between the Flintkote Co. (buyer) and the Pittsburg & Midway Coal Mining Co. (seller) dated September 26, 1973.
2. Coal Supply Agreement between the Flintkote Co. (buyer) and the Pittsburg & Midway Coal Mining Co. (seller) dated June 16, 1977.
3. Coal Supply Agreement between Southwest Forest Industries, Inc. (buyer) and Pittsburg & Midway Coal Mining Co. (seller) dated October 30, 1972.

3.1 **Delivery and Source.** All coal delivered by Seller to Buyer hereunder shall be supplied from Seller's McKinley Mine. Title to all coal delivered hereunder shall pass from Seller to Buyer when such coal has been loaded into railroad cars tendered by Buyer or its representative at Seller's McKinley Mine for delivery to Buyer. Damage to or loss of coal after title has passed shall be Buyer's responsibility.

Contract provision relating to passage of title and risk of loss contained in Coronado Station Coal Supply agreement dated October 31, 1977, between Salt River Project Agricultural Improvement and Power District (buyer) and Pittsburg & Midway Coal Mining Co. (seller).

3. **Delivery and Source.** All coal delivered by Seller to Buyer hereunder shall be supplied from Seller's McKinley Mine. Title to all coal supplied hereunder shall pass from Seller to Buyer when such coal has been loaded into railroad cars tendered by Buyer or its representative at Seller's McKinley Mine for delivery to Buyer. It shall be Buyer's obligation to make any claims necessary in regard to damage or loss of coal after title has passed to it.

Contract provision relating to passage of title and risk of loss contained in Coronado Station Interim Coal Supply Agreement dated April 14, 1979 between Salt River Project Agricultural Improvement and Power District (buyer) and Pittsburg & Midway Coal Mining Co. (seller).

3.1 **Delivery**. Except as otherwise provided herein, all coal delivered by seller to Buyer hereunder shall be supplied from seller's McKinley Mine. Unless changed pursuant to Section 3.5 hereof, title to all coal supplied hereunder shall pass from Seller to Buyer when such is loaded in rail cars at Seller's McKinley mine for delivery to Buyer (or at other mine or mines or at other supply points utilized by Seller in event of coal shipments from other sources). It shall be Buyer's obligation to make any claims necessary in regard to damage or loss of coal after title has passed to it.

Contract provision relating to passage of title and risk of loss contained in Coal supply Agreements between Arizona Public Service Company (buyer) and Pittsburg & Midway Coal Mining Co. (seller) dated March 30, 1973; January 28, 1974; and April 11, 1977.

3.1 **Delivery and Source.** All coal delivered by Seller to Buyer hereunder shall be supplied from Seller's McKinley Mine. Title to all coal supplied hereunder shall pass from Seller to Buyer when such coal has been loaded into railroad cars tendered by Buyer or its representative at Seller's McKinley Mine for delivery to Buyer. It shall

be Buyer's obligation to make any claims necessary in regard to damage or loss of coal after title has passed to it.

Contract provision relating to passage of title and risk of loss contained in Coal supply Agreements between Arizona Electric Power Cooperative (seller) and Pittsburg & Midway Coal Mining Co. (buyer) dated July 27, 1977 and October 3, 1979.

0.5 WHEREAS, Buyer desires to receive such coal supply for Unit No. 4 by unit train delivery and further to receive the coal supply for existing Units 1, 2 and 3 at the Cholla Plant by unit train delivery in order to achieve the lowest freight rate offered by The Atchison, Topeka and Santa Fe Railway Company, and . . .

Provision of contract relating to reason for unit train delivery in Coal Supply Agreements between Arizona Public Service Co. (buyer) and Pittsburg & Midway Coal Mining Co. (seller).

APPENDIX G

Relevant Portions of Transcript

VOLUME I, TRANSCRIPT OF PROCEEDINGS

Q. [By Mr. Pound, attorney for Pittsburg & Midway] What is a unit train?

A. [Mr. Holsten, President of Pittsburg & Midway] A unit train is terminology that is used by railroads to designate a type of movement of commodity and, in this case, it is coal. When the train as a whole stays as a unit, the locomotives, cars, caboose, stay as a unit, the train goes, comes to the coal mine in a unit. It is loaded in motion as a unit. It takes off, goes to the customer, and it stays as a unit there, is unloaded and then returns in that cycle. It stays in the cycle between the coal mine and the customer and, in theory, always stays in motion. That is the theory. It doesn't always stay that way, but it stays as a unit.

Vol. I, Transcript of Proceedings, at p. 125.

Q. [Mr. Pound] Are there railroad facilities at your McKinley County Mine?

A. [Mr. Holsten] Yes.

Q. When were those railroad facilities constructed?

A. The original railroad service to the mining area was constructed in 1961. That served the original McKinley Mine. . . . Subsequently, in 1974 and 1975, the railroad was further extended to serve the new mining area, . . .

So it was built originally in 1961 and then extended in roughly 1975.

Q. Who constructed those – would "spurs" be the word?

A. Yes, I think so.

Q. Who constructed them in each instance?

A. The Atchison, Topeka and Santa Fe Railroad or their agent; whoever handled it.

Id. at p. 132.

Q. [Mr. Pound] If you want to refresh yourself on Section 3.1 of the Contract, feel free to do so, and I will ask you this question.

Under this A[rizona P[ublic] S[ervice Co.] contract, Exhibit 9, when does title to the coal this is sold by P[ittsburg] & M[idway] to APS passed from P&M to APS?

A. [Mr. Holsten] The title passes to APS after the coal gets into the car at the mine.

Id. at p. 137.

Q. [Mr. Pound] Section 3.5 of the Contract, in a general sense, again, gives Arizona Public Service Company the right to change the point at which title to the coal passes.

Do you recall that passage of the Contract?

A. [Mr. Holsten] I am reading it in here, yes.

Q. To your knowledge, has APS ever taken advantage of that clause and alerted you to the fact they wanted to change the place or the point at which title passes?

A. No.

Q. If you know, if you recall from negotiations or from whatever direct source, why was Section 3.5 of the Contract important to APS? Did they tell you during the negotiating sessions?

A. I am not – at least at this point in time – I have no clear recollection of specifics as to why they wanted this option. We did discuss it. It was something that seemed to be important to them for whatever their reasons were. It was

not material to us in any particular fashion. But I can't say as to why they wanted it.

Q. Let me see if this jogs any recollections. If it doesn't, just say so. I am just testing a theory here.

You see Section 5 on the very first page whereas: "Buyer decides to receive such coal supply for Unit 4 and further to receive the coal supply for existing Units Number 1, 2, and 3 of the Cholla plant by unit train delivery in order to arrive at the lowest freight offered by the freight railroad."

If you remember – and don't let me put any words in your mouth; if you don't remember, you don't – did APS, during the negotiation session, make it its desire to get a good deal out of the railroad and have any agreement where title would pass?

A. Yes, indeed. I think that in APS's mind, as in the mind of any consumer, they are interested in the lowest cost of fuel. Cost of fuel to them means the cost of fuel actually burned in their boilers to make the electricity.

Backing that up, the cost of fuel would include the cost at the mine. It would include the rail rates. It would include all the other handling and other costs that are involved.

But a major portion in this particular group, wherein the relative cost of the coal was low, the major cost factor to them was the rail rate. As such, they reserved to themselves the sole option to negotiate a freight rate with the Santa Fe Railroad. The fact that it was a unit train as opposed to a single car motion was at their doing. It was a result of their negotiations with the Santa Fe Railroad.

Q. Can I ask you to turn to Section 5.1 of that Contract? It is on Page 7.

It deals generally with weights; does it not?

A. Yes.

Q. I would like you to explain, for the Examiner, in your own words, how the system works in terms of weighing the coal that is placed on the train; who weighs it initially; if there is any weighing done at Cholla, and how the two companies communicate back and forth after that has been done.

A. A key assumption in any type of an agreement like this wherein we sell coal for a price per unit of weight is that the coal will have to be weighed somewhere, and that the invoices would be then submitted and paid on the basis of that weight. The coal really can be weighed anywhere. It can be weighed at the coal mine. It could be weighed at destination. It could be weighed at some point in between. It just has to be weighed.

As part of the negotiation between P[ittsburg] & M[idway] and APS, one of the items discussed and agreed upon was who was responsible for weighing the coal; who puts the scale, buys the scale, puts it in, operates it, and so on. In this agreement, P[ittsburg] & M[idway] was responsible for the weighing of the coal. The coal is weighed in the cars at the mine.

Q. Is that the only weighing that takes place, or when the train arrives in Arizona, does APS weigh it again?

A. This would be the official weights. I don't know, in my own mind, whether APS put in a scale. If they did so, it would be to double check it from time to time. That would certainly be all right for us. This [sic] the official point in the Contract where the coal is weighed. It would be this weight with certain checks and balances on it. That would determine the billing price. It would also determine the price that the Santa Fe would receive for hauling the coal. It would be accepted by APS, and would be accepted by the Santa Fe.

Q. Are P[ittsburg] & M[idway] scales located right here at the mine in New Mexico?

A. Yes. They are located as an integral part of the loading procedure.

Id. at pp. 143-47.

Q. [Mr. Pound] Under this APS Contract, Exhibit 9, is it possible to determine or calculate the exact final purchase price of a given trainload of coal anytime while that particular trainload of coal is still in New Mexico?

A. [Mr. Holsten] No. There are the two variables that we have mentioned. One is the possibility in the future of adjustment for tonnage; if the scales are wrong. The second is the constant ongoing each and every month adjustment, depending on whether the average quality is above 10,000 BTU's per pound or below 10,000 BTU's per pound.

Id. at p. 150.

VOLUME II, TRANSCRIPT OF PROCEEDINGS–PARTIAL

Q. [By Mr. Barnicle, attorney for appellee, State of New Mexico] Does your company maintain a place of business in the State of Arizona?

A. [By Mr. Hall, Tax Advisor for Gulf Oil, parent company of appellant Pittsburg & Midway] I don't believe so. I don't have personal knowledge of it. I don't know.

Q. You know of no such location?

A. That's true.

Q. Does your company, as far as your personal knowledge extends, own any property in the State of Arizona?

A. Not the Pittsburgh[sic] & Midway that I'm aware of.

Q. Am I correct in understanding your testimony that the gross receipts from the sales made under those five contracts were all reported to and the subject of use tax payments to the State of Arizona?

A. Yes sir. That's what I testified to.

Q. Now within the limits of your familiarity with the use tax law of Arizona, would you please tell the Examiner what provisions of that tax law require the reporting to Arizona of gross receipts derived from sales of coal delivered at the McKinley County mine?

A. I guess my simple, if I may, definition would be that any delivery, a sale, I should say, and subsequent delivery of product into the state of Arizona on which tax has not been paid is to be assessed or the use tax is to be paid, the return is to be filed, the appropriate amount calculated and remitted.

Q. And as you understand the use tax law of the State of Arizona, Mr. Hall, are the requirements for such reports and such tax payments placed upon the seller or upon the purchaser of property sold and delivered outside, sold outside Arizona but delivered into a location within Arizona?

A. I'm sorry, would you repeat that?

Q. Well, I'll try.

As you understand the provisions of the use tax law of Arizona, when a sale of coal is effected – when a sale of coal is made outside the State of Arizona, but coal is delivered into the State of Arizona, do those Arizona provisions of the Arizona laws require that the reports and the tax payments to which you referred be made by the seller of the coal or by the buyer of the coal?

A. I believe the use tax provisions pertain to the buyer.

Q. I apologize for asking you such a lengthy and complex question, and I appreciate having your answer.

Let me ask you then, if I manage to make myself reasonably clear to you and you answered as you did, would the provisions of the use tax law of Arizona, as you understand them, not then apply directly to the five persons with whom your company has contracted rather than to your company?

A. May I confer with my counsel?

Q. Sure.

(Whereupon, there was a brief discussion held off the record.)

THE WITNESS: If I understand your question correctly, my answer would be yes.

MR. OWENS: Yes to what? I kind of forgot the question.

THE WITNESS: I have, too.

BY MR. BARNICLE:

Q. Well, I'd like to try it again, but I think maybe I'll just further confuse the thing. Could we trouble you to read it (indicating the Court Reporter.) [sic]

(Whereupon, the previous question was read back from the record.)

MR. BARNICLE: And the answer was –

THE WITNESS: Yes.

THE COURT REPORTER: Yes.

BY MR. BARNICLE:

Q. Mr. Hall, are those use tax reports and use tax payments which your company makes, routinely made to the State of Arizona, made, have they been done as a convenience and a benefit to your customers?

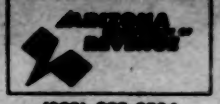
A. Yes, sir.

Vol. II, Partial, Transcript of Proceedings, at pp. 108-10.

APPENDIX H

(See foldout →)

* Although this form was revised in 1983, the credit provision is identical to that used for the tax years in question.



(602) 255-3884

USE TAX RETURN

REGISTRATION NO. PERIOD COVERED

	COMPUTATION OF TAX			AMOUNT	
1	TOTAL (Sales and/or Purchases)				
	DEDUCTIONS				
2	TRADE-INS (Property of a Like Kind)				
3	Purchases for own use or consumption where tax has been paid to seller authorized by Dept. of Revenue to collect the tax.				
4	Sales to the United States Government.				
5	Sales for resale.				
6	Sales to a licensed contractor of tangible personal property to be incorporated or fabricated into construction.				
7	Motor vehicle fuel subject to tax under the provisions of Art. 1., Chap. 9, Title 28, A.R.S.				
8	Sales of tangible personal property to hospitals organized and operated exclusively for charitable purposes.				
9	Sales of livestock, poultry, seed, feed and supplies for use or consumption in the business of farming, ranching, and feeding livestock or poultry, but not including equipment, fertilizers, herbicides and insecticides.				
10	$300.00 exemption is allowed in any one month for purchase outside the United States for personal use. This exemption does not apply if the total purchases for the month exceeds $300.00.				
11	OTHER AUTHORIZED DEDUCTIONS (List Detail on Reverse Side of Return)				
12	TOTAL DEDUCTIONS				
13	NET TAXABLE AMOUNT				
14	(4% OF LINE 13) AMOUNT OF USE TAX DUE				
15	LESS CREDIT FOR SALES TAX PAID IN STATE OF PURCHASE				
16	NET TAX DUE (Line 14 LESS LINE 15)				
17	PENALTY PLUS INTEREST (If unsure how to calculate, leave blank and Department will bill.)				
18	TOTAL AMOUNT DUE (Line 16 PLUS LINE 17)				

I SWEAR (OR AFFIRM) THAT TO THE BEST OF MY KNOWLEDGE AND BELIEF, IT IS A TRUE AND COMPLETE RETURN.

UT-6 Rev. 0/00

SIGNATURE OF TAXPAYER

Monthly return: Time for payment. Every taxpayer shall file on or before the 20th day of the month next succeeding the month in which the tax accrues. This return will be delinquent unless received by the Department of Revenue on or before the next to last day of that month. A return is required showing tangible personal property sold or purchased for use, storage or consumption within the State of Arizona during the preceding month.

Any taxpayer who shall have failed to pay such tax by the delinquency date will be subject to a penalty of 10% of the amount of the tax and interest. The rate of interest will vary with the rate charged by the IRS. Late filers who pay the tax due with the return will be billed by the Department for penalty and interest due.

USE TAX - TAXABLE PURCHASES. Enter the cost of all items removed from inventory for personal or business use and all purchases from out-of-state or in-state sellers on which no sales/use tax was paid. Do not include items held in inventory exclusively for resale. Examples of taxable purchases are: items purchased exempt pursuant to ARS 42-1409 but actually used in a taxable manner, items given away as gifts or for promotional purposes and machinery, equipment capital assets and other taxable items purchased for use from an out-of-state seller who failed to collect sales/use tax.

DETAIL OF OTHER AUTHORIZED DEDUCTIONS AS SHOWN ON LINE 11, PAGE ONE:

1. **Manufacturing or processing.** Machinery or equipment, used directly in manufacturing, processing, fabricating, job printing, refining or metallurgical operations. The terms "manufacturing", "processing", "fabricating", "job printing", "refining", and "metallurgical" as used in this paragraph refer to and include those operations commonly understood within their ordinary meaning. "Metallurgical operations" includes leaching, milling, precipitating, smelting and refining.

   $ _____

2. **Mining.** Machinery or equipment used directly in the process of extracting ores or minerals from the earth for commercial purposes, including equipment required to prepare the materials for extraction and the handling, loading or transportation of such extracted material to the surface. "Mining" includes underground, surface and open-pit operations for the extraction of ores and minerals.

   $ _____

3. **Telephone and telegraph companies.** Tangible personal property consisting of central office switching equipment, switchboards, private branch exchange equipment, microwave radio and carrier equipment, and coaxial cable.

   $ _____

4. **Electric Power production and transmission.** Tangible personal property consisting of machinery, equipment or transmission lines used directly in the production or transmission of electrical power, but not including distribution and, in addition, transformers and control equipment used at transmission substation sites.

   $ _____

5. **Pipelines.** Pipes or valves four inches in diameter or larger used for transporting oil, natural gas, artificial gas, water or coal slurry.

   $ _____

6. **Airlines.** Airlines holding a federal or state certificate of public convenience and necessity or foreign air carrier permit for air transportation. Tangible personal property consisting of airplanes, navigational and communication instruments and other accessories and related equipment acquired and used in conjunction with or becoming a part of aircraft to be used in transportation of persons, property or U.S. mail in intrastate, interstate or foreign air transportation for hire.

   $ _____

7. **Railroads.** Tangible personal property consisting of rolling stock, rails, ties, signal control equipment used directly in the transportation of persons or property in intrastate or interstate transportation for hire.

   $ _____

8. **Oil or gas.** Machinery or equipment used directly in the drilling for oil or gas or used directly in the process of extracting oil or gas from the earth for commercial purposes.

   $ _____

9. **Other deductions.**

   $ _____

TOTAL $ _____

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